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THE PRIVY COUNCIL
ADVOCATE

ON APPEAL FROM

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EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART.,
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REPORTED BY A. M. TALBOT,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XLV.—1917-1918.

LONDON:

Printed for the Council of Law Reporting
BY THE WHITEFRIARS PRESS, LIMITED, OF LONDON AND TONBRIDGE.

And Published
BY THE COUNCIL AT 30, MONTAGUE STREET, W.C. 1.

1918,

THE WHITEFRIARS PRESS, LTD
LONDON AND TONBRIDGE

THE WHITEFRIARS PRESS, LTD

2342-1-3-2001

WITH THE KIND PERMISSION OF THE INCORPORATED COUNCIL OF LAW REPORTING
REPRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.

NOTE.

A shortened form of reference to the *Law Reports* Indian Appeals, the Indian Law Reports, and Moore's Indian Appeals is introduced in this volume. A case the reference to which has hitherto been given as appears in the left-hand column below is now given as appears in the right-hand column.

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I. L. R. 6 C. 10.
I. L. R. 6 B. 10.
I. L. R. 6 A. 10.
6 Moo. I. A. 10.

ERRATA.

Page 29, head-note catchwords, for "(1. of 1872)" read "(IX. of 1872)."
Page 156, head-note, 1. 7, for "second adopted" read "first adopted."

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AND	
MERUSWAMIAR AND OTHERS RESPONDENTS.	1917
	Oct. 23.
ON APPEAL FROM THE HIGH COURT AT MADRAS.	

Hindu Law—Partition—Charitable Endowment—Food Chattiram—Scheme of Management—Intention of Donor—Confirmatory Inam Grants—Evidence.

The first appellant, the manager of a joint Hindu family the property of which was the subject of a partition suit, was in possession of lands granted about 1739 to an ancestor of the family, who was head of a mutt or institution founded by the donor. Some of the lands were granted for the ancestor's personal enjoyment, others for charitable purposes, namely, for conducting a food chattiram and building an agraharam. The High Court by its decree for partition ordered that a scheme should be settled for the management of the properties devoted to charitable purposes. The intention of the donor as to the succession to the latter lands was not clearly indicated by the grants, but having regard to the form of confirmatory inam grants made in 1865, their Lordships found that the intention was that they should be held by the successive heads of the mutt. The first appellant was the present head:—

Held, that there was no jurisdiction to order a scheme, since it

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

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would deprive the first appellant of his exclusive right to the management.

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Quære whether the law as accepted by the Board in *Ramanathan Chetty v. Murugappa Chetty* (1906) L. R. 33 I. A. 139 applies to a charity of the kind above mentioned.

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APPEAL from a judgment and decree of the High Court (August 18, 1909) affirming a decree of the Subordinate Judge of Tanjore.

The suit was instituted by the first respondent, since deceased, for partition of the properties of a joint Hindu family of which the adult co-parceners were himself and his two brothers. The first appellant was the eldest brother and managing member. The plaintiff by his plaint also prayed that a scheme should be settled for the management of certain enumerated properties which were admittedly subject to charitable and religious purposes. The purposes for which the latter properties were given were described in the grants as being for perpetually conducting a food chattiram near the tomb of a holy man, and in one case for making an aghraharam by building houses round the holy place.

The properties the subject of the litigation had all been granted to an ancestor of the family by the then Rajah of Tanjore. The circumstances of the grants and the other facts appear from their Lordships' judgment.

The first appellant by his written statement set out the origin and devolution of the properties, and alleged that the undedicated properties were impartible and descended to him by primogeniture. He further alleged that as head of a mutt founded by the original donor he was entitled to the exclusive management of the properties devoted to charitable objects.

The subordinate Judge made a decree for partition and by that decree ordered that a scheme for the management of the properties devoted to charity should be settled.

The High Court (Wallis and Sankaran Nair JJ.), by a judgment reported at I. L. R. 34 M. 470, affirmed the decree.

1917. July 13, 16, 17. *Sir Erle Richards, K.C.*, and *Parikh*, for the appellants. The properties were granted to the ancestor of the family to enable him to maintain his dignity as royal guru and head of the mutt. It is not disputed that the offices are now

vested in the appellant. The properties descended with the offices, and are impartible. Further, there is a custom of gaddinishin in the family, which indicates that there was a custom of primogeniture. [Reference was made to *Thakur Nitpal Singh v. Thakur Jai Singh* (1), *Garurudhwaja Parshad Singh v. Saparandhwaja Singh* (2), and Mayne's Hindu Law, 8th ed., par. 469; also, as to the proceedings upon escheat, to *Secretary of State for India v. Kama- chee*. (3)] The act that the plaintiff accepted a fixed monthly allowance shows that he was excluded from being a co-parcener: *Rai Raghunath Bali v. Rai Maharaj Bali*. (4) In any case a scheme for the management of the dedicated properties should not have been decreed. Those properties were granted to the head of the mutt, and have been managed by the successive heads for over 160 years. That there was a mutt appears from the fact that there was a separate installation of its head. The headship of a mutt is not partible: *Trimbak v. Lakshman* (5); Mayne's Hindu Law, 8th ed., par. 439. The inam grants of the dedicated properties were not to the father personally, but to the manager of the charities and his successors; the manager had always been the head of the mutt. The High Court relied on *Nubkissen Mitter v. Hurrischunder Mitter* (6), *Ramanathan Chetty v. Murugappa Chetty* (7), and *Thandavaroya Pillai v. Shunmugam Pillai*. (8) Those cases are, however, distinguishable. The first related to the endowment of a family idol, but here the endowment is of a public nature. In each of the remaining cases the endowment was of a public character, but upon the death of the last sole trustee the office had devolved upon his heirs. None of the cases related to charities connected with a mutt. Here the intention of the donor as appearing from the grants and the circumstances of the case was that the sole management should be in the head of the mutt. Upon a scheme being settled the management would be shared between the co-parceners, either in rotation or by division of the charities. Apart from the appellant's right to the sole management, a scheme of that nature

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(1) (1896) L. R. 23 I. A. 147, 115.
151, 156.

(2) (1900) L. R. 27 I. A. 238, 500.
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(3) (1859) 7 Moo. I. A. 476.

(4) (1885) L. R. 12 I. A. 112,

(5) (1895) I. L. R. 20 B. 495,

(6) (1818) 2 Morley Dig. 146.

(7) (1903) I. L. R. 27 M. 192.

(8) I. L. R. 32 M. 167.

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De Gruyther, K.C., and *Kenworthy Brown*, for the respondents, were called upon only as to the scheme of management. The dedicated properties, like the undedicated, were granted to Sethubavaswami personally, but were subject to the performance of the charities. Both Courts in India held that the properties were not attached to a mutt. It was not shown that a mutt was constituted: *Giyana Sambandha v. Kandasami Tambiran*. (1) The family house is not referred to in any document as a mutt or adhinam, nor was there any provision as to religious teaching or disciples. No legal significance attaches to the installation ceremony. It is significant that the Court of Wards, which could not perform the duties of a mutt, at one period managed the properties. The confirmatory inam grants are not the source of title and did not affect the succession. The intention of the donor as to the succession does not appear from the grant nor the circumstances; the succession is therefore governed by the ordinary Hindu law: *Lahar Puri v. Puram Puri* (2), Mayne's Hindu Law, 8th ed., par. 439. The properties are joint family properties subject to charitable purposes. Upon the authorities sought to be distinguished by the appellant a scheme of management was properly ordered. *Ramanathan Chetty v. Murugappa Chetty* was affirmed by the Board. (3)

Sir Erle Richards, K.C., in reply, referred to *Sathianama Bharati v. Saravanabhagi Arumal*. (4)

1917. Oct. 23. The judgment of their Lordships was delivered by SIR WALTER PHILLIMORE. The plaintiff in this suit is the younger brother of the first defendant (who is the present appellant) and the nature of his claim is twofold. He alleged, first, that there were certain joint family properties, of which the first defendant had been manager, and of which he now desired his share; secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the management

(1) (1886) I. L. R. 10 M. 375,
386.

(3) L. R. 33 I. A. 139.

(2) (1915) L. R. 42 I. A. 115. 270.

(4) (1893) I. L. R. 18 M. 266,

of which he was entitled to share, and for which he desired that there should be a scheme of management settled by the Court. The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

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The properties, both non-religious and religious, were granted at various times by the then Rajah of Tanjore to the ancestor of the parties, one Sethubavaswami. They descended to his son, and, that son having no natural children, to an adopted son, and then to his adopted son, Ramasetuswami, who died leaving three natural sons, namely, the plaintiff and the first and second defendants.

At the time of the death of Ramasetuswami in 1886 his three sons were minors. The first defendant came of age in 1890 and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Rajah of Tanjore. He was a holy man, who somewhere about the year 1739 was brought from a mutt or religious institution at Mannargudi to Tanjore, and was constituted by the Mahratta Ruler of Tanjore his guru or spiritual preceptor. His descendants in regular succession became gurus to the rajah as long as the raj remained, and were installed by the rajah for the time being with certain ceremonies, one of the most important being the placing of the new guru on the gaddi. There was also a religious ceremony, in which the head of the mutt at Mannargudi and certain other heads of mutts took part, to which reference will be made later on.

When Ramasetuswami, the father of the parties, died the raj had escheated; but after the usual religious ceremony had taken place the man claiming to be the adopted son of the last rajah installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the guru of the man who installed him.

The contention on behalf of the first defendant is that the office of guru is hereditary by way of primogeniture, and that the non-religious lands were given to the guru for the time being to maintain the dignity of his office and are therefore impartible. The

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contention for the plaintiff is that these lands were granted to the original guru, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of guru.

Shortly after the escheat of the raj in 1855 inquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Ramasetuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the rajah, which would escheat upon the termination of the raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants and consequently had not escheated. Thereupon new inam grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office. The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a royal priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal inams of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit rent. In some of the grants the inam is said to be tax free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non religious lands out of the ordinary rule of inheritance. This is what has been decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature or Madras upon appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both Courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be

settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others. This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family property.

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The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food chattiram near the tomb of the holy man Meruswami, and in one case for the purpose of making an agraharam by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid down by various decisions in India, and apparently accepted in one case by the Privy Council (*Ramanathan Chetty v. Murugappa Chetty* (1)), is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition. But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit. The case most nearly in point is *Thandavaroya Pillai v. Shunmugam Pillai* (2); but it does not decide this question, and does not seem to have come up before the Privy Council.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class, because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this

(1) I. L. R. 27 M. 192 : L. R. 33 I. A. 139.

(2) I. L. R. 32 M. 167.

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case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the maharatta rajah to Sethubavaswami, which take the form of orders to his officers, describe them as being for the purpose of inam and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the royal priest Sethubavaswami. Having regard to the donee's position and the way in which these grants are set forth, it would be difficult, if there was nothing else to guide the Court, to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title deed granted to the manager for the time being of the charity, which is then described. By the deed the title of the manager is acknowledged, and the inam is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking, as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands any more than it was intended to vary the previous rules as to the descent of the non-religious lands, these confirmation grants afford evidence as to the nature of the tenure as it was commonly understood at the time. These lands, then, had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the mutt or institution founded when the original guru was induced by the rajah to migrate from Mannargudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new guru were of a double character. The induction, as it may be called, by the rajah to the office of royal guru with a seat upon the gaddi

was preceded by a religious ceremony in the nature of an ordination or institution in which the mohunt, or head of the parent mutt, placed the first defendant in the seat of headship, other heads of mutts taking part in this ceremony, and certain religious rites following.

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It is in evidence that the defendant, as the head of the mutt thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent, occasions given religious instruction. He is thus pointed out as the natural head and administrator of religious charity ; and the office of head of the mutt and the administrator of the charity have been associated from the first.

The headship of a mutt is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the mutt, to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jafar v. Aji* (1), and further approved in *Trimbak v. Lakshman*. (2) This being so, there was no jurisdiction in the Indian Court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

Their Lordships think that the plaintiff should have his costs in the Court of first instance, as he there recovered a very substantial part of his claim, namely, his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands ; but they think that there should be no costs of the appeals to the High Court and to His Majesty in Council.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied in so far as it confirmed that part of the decree of the lower Court which ordered that a scheme be settled for the due management of the religious and charitable properties, and in so far as it ordered

(1) (1864) 2 Mad. H. C. 19.

(2) I. L. R. 20 B. 49

J. C. the first defendant to pay the costs on appeal of the plaintiff and
 1917 second defendant, and that the decree of the lower Court be varied
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 SWAMIAR appeal to the High Court or to His Majesty in Council.

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Solicitors for appellants: *Chapman-Walker & Shephard.*

Solicitor for respondents: *Douglas Grant.*

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ABDUL HUSSEIN KHAN APPELLANT;
 AND
 BIBI SONA DERO AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
 COMMISSIONER, SIND.

*Custom of Family—Inheritance—Mahomedan Law—Evidence of Custom
 —Instances—Bombay Regulation IV. of 1827, s. 26.*

In a suit as to the right of inheritance upon the death intestate of a member of a Mahomedan family for many generations resident in Sind, the appellant alleged that by a custom of the family, varying the Mahomedan law, the sister of the intestate was excluded in favour of the male paternal collaterals. By s. 26 of Bombay Regulation IV. of 1827, extended to Sind by notification, the law to be observed upon the trial of suits, in the absence of Acts or Regulations applicable to the case, is "the usage of the country in which the suit arose." The appellant adduced evidence in support of the alleged family custom, and further contended that under s. 26 above mentioned a presumption arose in favour of the custom as being one known to prevail in the district:—

Held, that the presumption relied upon did not arise, and that the evidence did not establish that the custom existed in the family.

Consideration of the weight to be attached to evidence of instances of inheritance in a family in accordance with, or contrary to, an alleged custom of the family.

Observations on this point in *Mirabiri v. Vellayanna* (1883) I. L. R. 8 M. 464 approved.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner of Sind (January 9, 1912) reversing the decree of the District Court (May 31, 1910).

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

The litigation related to the estate of Mir Hussein Ali Khan of Talpur, a Mahomedan, who died intestate on January 30, 1907, leaving no widow or issue. The suit was instituted by the appellant, a son of a half-brother of the deceased, against the respondents, who were respectively the sister of the deceased and the sister's son. The pleadings raised an issue whether the deceased was a Sunni or a Shia; both Courts held, in the respondents' favour, that he was a Shia. The main question arising upon the appeal was whether the appellant had established a family custom which he alleged. The custom was put forward in different forms, but in substance it was that in the family of the deceased daughters were excluded from inheritance in favour of sons, and sisters in favour of male paternal collaterals.

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The trial judge held that the custom was established by the evidence, but that decision was reversed upon appeal.

The facts are stated in the judgment of their Lordships.

1917. July 2, 3, 5, 6, 9, 10, 12. *P. O. Lawrence, K.C.*, and *Arthur Grey*, for the appellant.

De Gruyther, K.C., and *Sir W. Garth*, for the respondents.

The arguments were chiefly directed to the evidence, more especially to the evidence of instances of inheritance in the family in accordance with, or contrary to, the custom alleged. On behalf of the appellant reference was made to Bengal Regulation IV. of 1827, s. 26; *Hurpurshad v. Sheo Dyal* (1), *Daya Ram v. Sohail Singh* (2), *Makhan Singh v. Dolo* (3), *Mohesh Chunder Dhal v. Satrugan Dhal* (4), *Pranjivan Dayaram v. Bai Reva* (5), *Rajah Deedar Hossein v. Zohoor-oon-nisa* (6); and the Indian Evidence Act (IX. of 1872), s. 13. For the respondents reference was made to *Mirabivi v. Vellayanna* (7), *Mahomed Sidick v. Haji Ahmed* (8), and the *Gazetteer of India*, vol. 22, pp. 397 et seq.

Oct. 30. The judgment of their Lordships was delivered by

LORD BUCKMASTER. On January 30, 1907, Mir Hussein Ali Khan of Talpur died intestate, leaving neither widow nor child. His

(1) (1876) L. R. 3 I. A. 259, 285.

(2) 1906 P. R. No. 110 (F. B.).

(3) 1906 P. R. No. 4.

(4) (1902) L. R. 29 I. A. 62.

(5) (1881) I. L. R. 5 B. 482, 489.

(6) (1841) 2 Moo. I. A. 441.

(7) I. L. R. 8 M. 464.

(8) (1885) I. L. R. 10 B. 1, 9.

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nearest surviving relations were the plaintiff, Abdul Hussein, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting exclusively of personal property, and largely of what we should call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations. It is a dispute about the inheritance of this property that has given rise to the present appeal. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mahomedan, and, if Mahomedan law governed the question, the rights of the parties would vary accordingly whether the deceased was a member of the Shia or of the Sunni sect. If the former, the sister would inherit the whole estate; if the latter, the plaintiff would be entitled to a half. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mahomedan law, but that they are regulated by a custom well known and distinctly ascertained, by which, notwithstanding the provisions of the Koran, women are excluded from any share in the inheritance of a paternal relation. He further alleges that, if this contention does not prevail, the deceased was a Sunni and not a Shia, and that he is therefore entitled to the more limited rights to which reference has been made. Their Lordships think it is convenient to dispose of the latter contention first.

Although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive, both the Judicial Commissioner, before whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind, before whom the appeal was heard, have decided that the deceased was of the Shia persuasion, and with this finding their Lordships see no reason to interfere.

There remains, therefore, for consideration only the question of

custom, and upon this the Court of first instance and the Court of appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds.

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Before proceeding to investigate the facts and circumstances that have influenced the two judgments already mentioned, it is desirable to make plain what is the position of a person like the plaintiff, who asserts that custom, and not Mahomedan law, gives him the rights he claims. The appellant alleges that, by s. 26 of Bombay Regulation IV. of 1827, which has by notice been extended to the district of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He bases this argument upon the words of the Regulation, which are as follows: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."

Their Lordships cannot accept this view. In a case of *Daya Ram v. Sohail Singh* (1), which related to proof of a Hindu custom, the Chief Court of the Punjab had to consider a similar question on the terms of s. 5 of the Punjab Laws Act, the words of which are more strictly in favour of the appellant's contention than those of the Regulation that governs this dispute. This contention was dealt with by Robertson J. at p. 410 of the report in words which their Lordships think so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. The learned judge said: "In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured

(1) 1906 P. R. No. 110 (F. B.).

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of custom rather than law, nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of customary law, nor any theory of custom or deductions from other customs which is to be a rule of decisions, but only 'any custom applicable to the parties concerned which is not'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so clause (b) of s. 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

The principle that underlies this statement is, in their Lordships' opinion, correct, and is applicable to the construction of the Regulation that governs the present case. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognized in India (see *Soorendranath Roy v. Heeramonee Burmoneah* (1)), although such a custom is unknown to the law of this country, and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

(1) (1868) 12 Moo. I. A. 91.

Nor are their Lordships prepared to accept without qualification the statement of the additional Judicial Commissioner, Mr. H. N. Crouch, that it is necessary to reject as useless for proving the custom "all those instances where we have no evidence that the deceased left any estate at all, or where there is no evidence to show its nature or value, or the amount of liabilities against it, e.g., whether or not it consisted merely of a jagir, or mafi land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; where there is no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; where, in case of a married lady, we have no evidence showing the actual amount of dowry received; where, in case of unmarried ladies, there is no proof that they knew of the custom and stood aside in obedience to it. And in all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and, with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusions." An example of each of the conditions there laid down ought certainly to be established by some witness, but it is not, in their Lordships' opinion, necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight is due.

But, as pointed out by this Board in *Ramalakshmi Ammal v. Sivantha Perumal Sethurayar* (1): "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down. It is urged against the appellant that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on

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(1) (1872) 14 Mco. I. A. 585.

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July 12, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on July 10, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side)"; and finally in the plaint in the present proceedings, where the custom is asserted in these terms: "But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Balochis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs, but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, and the question is, was such a custom proved?

A very large number of witnesses were called in its support, and a number of instances, amounting to sixty-one in all, were given as evidence of its operation. This evidence has been the subject of the most painstaking and careful analysis by both the Courts, and has again been carefully considered by their Lordships with the assistance of the criticisms made, both in the District Court and in the Court of the Judicial Commissioner. Upon the whole their Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the Court upon appeal must be accepted.

Their Lordships do not propose to examine again in detail each one of the instances mentioned, for there are one or two general observations which are, in their opinion, sufficient. The custom alleged, in its form most limited and best suited to the plaintiff's case, is a custom confined to the Talpur Mirs, the descendants of one Kaku Khan. These descendants are now represented by eight different families, namely, Sorabanis, Rustomanis, Bijranis,

Shahdanis, Mahomedanis, Shahwanis, Jamanis, and Manikanis, of which the deceased belonged to the Shahdanis. Relevant and material instances are to be extracted from the descent of these families. The attempt to extend the custom to the "respectable Balochis and Sardars" broke down, and it would in their Lordships' opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Balochis and Sardars." Dealing, therefore, with the Talpur Mirs alone, their Lordships think the evidence is subject to the following comments :—

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In the first place, many of the instances relate to descendants of a ruling family and depend upon the eldest son inheriting to the exclusion of his brothers and sisters. Although it is true that the sisters are excluded, yet it is plain that we have not in these cases reached the custom on which the plaintiff relies, because in a ruling family an overriding custom has excluded all males as well as females in favour of the eldest male. Nine further cases relate to instances where the excluded daughters were unmarried and living with their brothers. These instances cannot be confidently relied upon. The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they relate do not exist, or whether they are put on one side because, in the circumstances, there is no need that they should be asserted. This is pointed out in the case of *Mirabivi v. Vellayanna* (1) by Turner C. J. and Hutchins J. It is there stated at p. 465: "It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the judge of a partition in the father's lifetime are not inconsistent with Mahomedan law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahomedan law. Indeed, in many parts of the country it is unusual for Mahomedan ladies to insist on their unquestioned rights. They will often prefer being

(1) I. L. R. 8 M. 464.

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maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mahomedan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much.' With that statement their Lordships are in entire agreement.

In certain other instances there is no substantial evidence of property to be divided, and in the most recent cases of all there is only one witness who speaks in their support, although it is plain that there must have been others who could have spoken upon the matter. It ought not, of course, to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon; nor again, because in certain respects some of the witnesses may be found untrustworthy.

But there is one outstanding circumstance in the present case which their Lordships think demands attention. Mir Rustom Khan is the admitted head of the Rustomanis. He is a man of position and authority, and he says in plain terms that "there is no such custom amongst our families by which daughters and sisters are excluded from inheritance. They get their share of inheritance according to Mahomedan law."

He is supported by other witnesses, of whom the learned trial judge says that they are all witnesses of high position, and that there seems no special reason why they should combine to give false evidence on behalf of the defendants, although he adds that Mir Rustom Khan was not on good terms with the plaintiff, and inclined to exaggerate his evidence. But the learned judge declines to accept the view that these important witnesses are committing perjury, and the statement which he thinks shows a tendency to bias in favour of the defence is a statement which may well have been misunderstood. Mir Rustom Khan was speaking of the religion of the deceased, and stated that whenever a Sunni entered his house he had it washed three times. As the servants were Sunnis the learned judge thinks that this is a clear improbability. It appears to their Lordships quite possible that Mir Rustom Khan was only referring to people

of a similar social standing to the deceased, who, it is not unreasonable to assume, would not pay the same attention to the religion of his servants that he might to the religion of his friends. But however this may be, Rustom Khan can have been under no misapprehension upon the question of this custom. If he did not know of it, it may be safe to say that it did not exist. If he did know of it, he could not have denied the knowledge without deliberate untruth, which there is no reason to impute to his evidence.

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There is, however, one instance in connection with his testimony which does need some further consideration. Mir Validad Khan, who was the paternal uncle of Rustom Khan, died leaving three sons and six daughters. Mir Rustom Khan was asked to determine how the estate should be divided among the three sons, and he made an award effecting this division. It is suggested that if no such custom as that alleged existed he must have known that he was making an improper division of the property. Their Lordships do not think this is the only and necessary inference. He was never asked to determine the rights as between the brothers and the sisters, but merely how to divide the property among the brothers themselves, and it may well be that he assumed that arrangements had been made with the sisters which rendered it unnecessary for him to consider anything more than the actual point that he was called upon to determine. He also speaks to a matter to which constant reference is made by the witnesses, and that is that the question of inheritance is decided in each family, either by a family council or by the head of the family. This is an extremely probable explanation of many of the instances in the present case, and if it be accepted it destroys the custom, because the division made according to the wishes of the members of a family council is certainly not the custom on which the plaintiff relies.

In every case of this kind the burden of proof lies heavily upon the plaintiff, and, though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.

There is also another piece of evidence which is of considerable value : this is to be found in the revenue records which relate to the

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descent of the property of Mir Ghulam Ali Khan, who died leaving three widows, one sister, two daughters, and a brother ; one of these records, dated October, 1903, shows a clear division according to the Mahomedan law, and not according to any such custom as is alleged. There are no other revenue records produced, and it is said that the reason of their non-production is that they do not assist the defendant's case. But their Lordships think the omission is serious. The best evidence associated with any such custom as that alleged would be found in connection with the division of land, and these records would at least have established the fact that land was left, its extent and character, and would, were it the fact, make clear the point which the evidence leaves uncertain, that, in the division of this property, the women were excluded.

The argument put forward by the defendant that, in many of the cited instances, the women said to have been excluded have been provided with dowries either in the lifetime of the owner of the estate, on the division of which they received no benefit, or after his death by a male relation, and that this was equivalent to and must be taken as a recognition of their right to share, is one to which their Lordships are unable to accede. It is quite possible that the husband of a wife who had been suitably dowered would not desire to claim rights of inheritance against those by whose generosity or at whose expense the dower had been provided, but this would not involve the conclusion that the right to share existed and had been satisfied by the dower.

Again, such an argument, though it might affect inheritance as between father and daughter, would not cover the present case, for if a daughter had been dowered by her father, and this were treated as equivalent to an advancement of her share in his estate, this would not affect a claim like the present put forward by a woman to a share in her brother's estate by whom she had never been dowered at all.

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that, although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to

Mahomedan law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents : *Wontner & Sons,*

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Declaratory Decree—Alienation by Hindu Widow—Suit by Reversioners
—*Specific Relief Act (I. of 1877), s. 42.*

The widow and daughter of a deceased Hindu governed by the Mitakshara executed a deed of gift of his property in favour of one of the next reversionary heirs to the deceased. Three brothers who claimed to be reversionary heirs equally with the grantee sued for a declaration that the deed was invalid and not operative as against them after the deaths of the grantors. The grantee pleaded that he was the only next reversionary heir and that, upon the principle of acceleration, he was absolutely entitled to the property by virtue of the deed. Both Courts in India found that the plaintiffs were also next reversioners. The High Court made a declaration in favour of the plaintiffs as prayed:—

Held, that the declaration was rightly made under s. 42 of the Specific Relief Act (I. of 1877) although it necessarily involved a finding that the plaintiffs were next reversionary heirs.

Janaki Ammal v. Narayanasami Aiyer (1916) L. R. 43 I. A. 207 distinguished.

APPEAL from a judgment and decree of the High Court (January 29, 1914) reversing a decree of the Subordinate Judge Third Court, Patna.

The litigation related to the property of one Deonarayan Singh, deceased, and arose under the following circumstances. Four

* *Present*: LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, and SIR LAWRENCE JENKINS.

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brothers, Mahipat, Saligram, Het Narayan, and Drigpal, who were governed by the Mitakshara law, were at one time joint-owners of family property, but were all dead at the date of the suit. Saligram was succeeded by his only son, the said Deonarayan, and the property was then partitioned. Deonarayan died leaving a widow, Jaibasi Koer, and a daughter, Sakalbati Koer, who were the third and fourth respondents. The appellant Saudagar was the only son of Mahipat. Het Narayan died childless. Drigpal had three sons, namely, Jagdip, who died during the litigation, and the respondents Pardip Narayan and Barhamdeo.

On April 25, 1906, Jaibasi Koer and Sakalbati Koer executed a tamliknama, or deed of gift, by which they absolutely conveyed to Saudagar the property which had belonged to Deonarayan, and put him into possession.

The sons of Drigpal in 1908 instituted the present suit against Saudagar, Jaibasi Koer, and Sakalbati Koer. The plaintiffs prayed for a declaration that the ladies had no right to execute the tamliknama, and that the appellant Saudagar had acquired no title thereunder. They also claimed possession, but that claim was abandoned upon the appeal to the High Court.

The appellant by his written statement contended that the plaintiffs had no cause of action. He alleged that Drigpal was only a half-brother of Saligram and that he, the appellant, was the only reversionary heir. He contended that the effect of the tamliknama was to make him absolute owner of the properties according to the principle of acceleration, and that the plaintiffs had not, and could not in future have, any right in it.

The Subordinate Judge dismissed the suit on the ground that the plaintiffs had no cause of action during the life of Jaibasi Koer and Sakalbati Koer; he, however, found as a fact that Drigpal and Saligram were brothers of the whole-blood, the plaintiffs consequently being presumptive heirs equally with Saudagar.

The plaintiffs appealed to the High Court, limiting their appeal to a claim for a declaration that the tamliknama of April 25, 1906, was not valid, nor operative against them after the deaths of Jaibasi Koer and Sakalbati Koer.

The High Court (Stephen and Mullick JJ.) agreed with the finding of fact, and made the declaration as prayed. In the course of their

judgment they said "the fact that such a declaration must be founded upon reasons that would support a declaration that the plaintiffs are heirs to Deonarayan, were it open to us to make such a declaration, cannot shut them out from their right to a declaration as to the validity of the document in question."

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1917. Oct. 19. *Sir Erle Richards, K. C.*, and *Dunne, K. C.*, for the appellant. In substance the object of the appeal to the High Court was to obtain a declaration that the plaintiffs were presumptive heirs equally with the present appellant. Under these circumstances a declaratory decree should not have been made : *Kathama Nachiar v. Dorasinga Tever* (1) ; *Janaki Ammal v. Narayanasami Aiyer*. (2) The suit contemplated by s. 42 of the Specific Relief Act is one on behalf of all the reversioners, impeaching a transaction as against those who may eventually become heirs : *Venkatanarayana Pillai v. Subbammal*. (3) The present suit was not of that nature. [Reference was also made to Mayne's Hindu Law, 8th ed., pars. 647, 648.]

De Gruyther, K.C., and *Parikh*, for the first and second respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. Their Lordships do not consider it necessary to call upon counsel for the respondents in this appeal.

The question is a very short one. It appears that the High Court from which the appeal has been brought has made a certain declaration. There is absolutely no ground for saying that that declaration is in any way erroneous, nor has counsel for the appellant suggested any error. The point is simply whether, under the practice prevalent in India, such a declaration ought to have been made. In order to show that no declaration ought to have been made, reference has been made to various cases, and in particular to the case of *Janaki Ammal v. Narayanasami Aiyer*. (2) The point of that case is this : There was a Hindu widow entitled to an estate, and a suit was brought by a person, presumptively entitled as heir after her

(1) (1875) L. R. 2 I. A. 169.

(2) (1916) L. R. 43 I. A. 207.

(3) (1915) L. R. 42 I. A. 125.

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death, to prevent waste. It was held that there was no waste at all, and the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or as sometimes called reversionary, heirs, and it was held by this Board, that no such declaration ought to be made. It is said that this case is analogous to that, and that no declaration ought to have been made. On the other hand, if s. 42 of the Specific Relief Act, 1877, is referred to, it will be seen that one of the illustrations given is this : "The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime."

It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs. It was intended that this deed should operate to confer the whole interest on the grantee, on the footing that the other reversionary heirs, being of the half-blood only, could not come in in competition with the grantee, and the real question in the suit, as far as their Lordships can make out, was simply whether the claimants were claimants of the half blood or of the whole-blood, and it was decided by both Courts that they were not of the half blood, but of the whole-blood.

Under these circumstances it appears to their Lordships that this is an exact illustration of that which s. 42 of the Specific Relief Act was meant to provide for. It is quite true that it involves a finding that the plaintiffs in this case are reversionary heirs, but that must always be the case where a declaration is made following the illustration (e) of the section, because it is only in virtue of the persons.

claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made.

Under these circumstances their Lordships can see no possible ground for interfering with the decree of the High Court, and the appeal therefore should be dismissed with costs. Their Lordships will tender their humble advice to His Majesty accordingly.

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Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *E. Dalgado.*

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Appeal to High Court—Time-barred Appeal—Ex parte Order of single Judge admitting Appeal—Reconsideration upon Hearing of Appeal—Indian Limitation Act (IX. of 1908), s. 5.

At the hearing by a Division Bench of the Madras High Court of an appeal presented after the period allowed by the Indian Limitation Act, 1908, but which has been admitted under s. 5 of that Act by an order made ex parte by a single judge, there is jurisdiction to dismiss the appeal upon the ground that sufficient cause for the delay has not been shown.

The above procedure is in accordance with the practice of the Madras and other High Courts, but it is urgently expedient that procedure should be adopted which will secure that any question of limitation affecting the competence of the appeal should be determined finally at the stage of its admittance.

APPEAL by special leave from a judgment and decree of the High Court (November 4, 1908) dismissing an appeal from a decree of the additional Subordinate Judge of Tanjore.

The suit was instituted by the first respondent against the appellant and other persons who were joined as respondents to the appeal to the High Court and in the present appeal. The

* *Present:* LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, and SIR LAWRENCE JENKINS.

J. C. claim was in respect of the estate of the Zamindar of Sillatur,
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The facts material to the question of practice, which alone was argued before the Board and is the subject of the judgment of their Lordships, appear from that judgment.

1917. Oct. 16, 17, 18. *Sir Erle Richards, K.C.*, and *Kenworthy Brown*, for the appellant. There was no power in the High Court to reconsider the order admitting the appeal. The order was properly made by a single judge under the Rules of the Madras High Court, 1905, r. 1 (1.) (b). The respondents must have had notice of the order, since they filed evidence controverting the affidavit upon which the order was made. The respondents' proper remedy was by an application under s. 623 of the Code of Civil Procedure for a review of the order. Review is applicable in the case of an ex parte order: *Woodroffe and Ameer Ali*, Civil Procedure Code, p. 1316. At the time of the hearing the right to apply for a review, or to appeal (if there was that right) was barred by limitation. There is no inherent power in the High Court to reconsider an order of the Court unqualified in its terms; the power, not being given by the Code, does not exist. The procedure followed in the present case was held to be invalid by the Calcutta High Court in *Bharrutt Chunder Roy v. Issur Chunder*. (1) That decision has not been followed in later cases: *Dubey Sahey v. Caneshi Lal* (2); *Jhotee v. Omesh Chunder* (3); *Bhismadeo Das v. Sita Nath Ray* (4), including *Venkatrayudu v. Nagadu* (5) in Madras. The procedure is, however, not supported by the Code and is ultra vires. If there was power to reconsider the order admitting the appeal the affidavit evidence shows that there was "sufficient cause" within s. 5 of the Limitation Act for admitting it.

De Gruyther, K.C., and *O'Gorman*, for the respondents, were not called upon.

Nov. 8. The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. On November 4, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground

1. (1867) 8 Suth. W. R. 141.

2. (1875) I. L. R. 1 A. 34 (F.B.).

3. (1879) I. L. R. 5 C. 1.

4. (1882) 17 Cal. W. N. 42.

5. (1886) I. L. R. 9 M. 450.

that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits.

The original decree was passed on February 8, 1905, in the Court of the additional Subordinate Judge at Tanjore in the plaintiff's favour. Against it the first defendant, Krishnasami Pandikondar, preferred an appeal to the Madras High Court. The last day for its presentation was July 10, when the Court reopened after vacation; but it was not presented until July 12, 1905. It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period. He accordingly again presented his appeal on July 26, supported this time by affidavits purporting to explain the delay. The application for admission came before Sankaran Nair J., sitting as a single judge, and on July 31 he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on October 7, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several affidavits, accepted this view and, on November 4, 1908, dismissed the appeal as provided by s. 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by Sankaran Nair J. was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety

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would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that, though unqualified in expression, it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Aiyangar; nor was it even mentioned in the original review petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in s. 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and, after a careful and critical examination and appreciation of the evidence,

the learned judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitor for appellant : *Douglas Grant*.

Solicitors for respondents : *Chapman-Walker & Shephard*.

BHAGWANDAS PARASRAM (A FIRM) . . APPELLANTS ;
AND
BURJORJI RUTTONJI BOMANJI . . . RESPONDENT.

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Nov. 26.
—

ON APPEAL FROM THE HIGH COURT AT BOMBAY

Contract — Wager — Sale — Unilateral Intention to wager — Pakka Adatias—Bombay Act III. of 1865, ss. 1, 2—Indian Contract Act (IX. of 1872), s. 30.

Speculation does not necessarily involve a contract of wagering, and to constitute a wagering contract an intention to wager by both parties is essential.

The respondent instructed the appellants, who acted as pakka adatias, to sell for him 4,000 tons of linseed for future delivery. According to the customary incidents of the employment of pakka adatias the transaction between the parties took the form of a sale from the respondent to the appellants. The appellants made contracts in their own names selling the linseed to various buyers at the agreed price. The appellants consequently did not stand to gain or lose by any change in the market price. There was no agreement or understanding, express or implied, between the appellants and the respondent that the linseed should not be delivered, nor that the appellants should protect the respondent from liability to make delivery. The market price having risen before the date of delivery, and the respondent not having made any delivery, the appellants sued him to recover the loss incurred by them

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

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upon the contracts of resale, less an amount deposited by the respondent as security against loss:—

Held, that the transaction was not a wagering contract, even if the appellants did not expect the respondent to deliver, and that the appellants were entitled to recover.

APPEAL from a judgment and decree of the High Court (March 28, 1913) reversing a judgment and decree of Beaman J. (October 24, 1912).

The appellants sued the respondent in the High Court to recover a sum of over Rs. 90,000 on account of losses incurred by them as pakka adatias upon the sale and purchase of 4000 tons of linseed. The respondent, among other defences, alleged that the transactions out of which the debt arose were by way of gaming and wagering.

The facts appear from the judgment of their Lordships, and more fully from the reports, mentioned below, of the hearings in the High Court.

Beaman, J. made a decree in the appellants' favour. In the course of his judgment, which is reported at I. L. R. 37 B. 347, he said: "Where, therefore, a pakka adatia, who has been compelled owing to default of his client on one side or the other either to find goods or money, seeks to recover from that defaulting client the amount he has thus been obliged to pay on his account, it becomes, I think, on the face of it almost impossible to say that as between him and his client any defence of wagering could succeed. There may be very exceptional cases where the defendant could satisfy the Court that the pakka adatia not only knew that he (the defendant) was merely gambling, but that the client whom he found either to buy or sell with the defendant was gambling too; and if that could be satisfactorily proved then doubtless the intermediary would be affected by the provisions of Act III. of 1865 and could neither recover his commission nor any losses he had voluntarily incurred on account of his client. Such a case, I think, could only occur where the pakka adatia had handed over a complete order of one client to another and could be shown conclusively to have been fully aware of the intention of both those clients to do nothing more than gamble in differences."

Upon appeal Sir Basil Scott C. J. and Chandavarkar J., by a judgment reported at I. L. R. 38 B. 347, set aside the decree

holding that the common understanding between the appellants and the respondent was that the dealing should be merely in differences, and that the employment of the appellants was consequently by way of wagering and illegal.

1917. Oct. 26, 29. *Sir W. Garth*, for the appellants. The transaction was not by way of wagering. The appellants could neither gain nor lose by the rise or fall of the market since they sold at the price at which they bought. Whatever the event they could only recover their commission and an indemnity for losses. It is not material that the respondent may not have intended to deliver, even if the appellants knew that that was so. [Reference was made to *Bhagwandas v. Canji* (1), Bombay Act III. of 1865, ss. 1, 2, and to the Indian Contract Act (I. of 1872), s. 30.]

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Nov. 26. The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed ; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed, and the third was in these terms : "Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiffs were not aware of the defendant's intention to deal in differences only ?"

The trial judge, sitting on the original side of the High Court at Bombay, found all the issues in the plaintiffs' favour, and passed a decree for the amount claimed. On appeal the appellate bench of the High Court agreed with the findings of the trial judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit. It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as pakka adatias. The defendant, on the other hand, was a young man without any regular business.

(1) (1905) I. L. R. 30 B. 205.

J. C. 1917 who, with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market.

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In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4000 tons for September delivery. On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by resales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as pakka adatias, and, to secure them against loss, sums amounting in the aggregate to Rs. 61,000 were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorize them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross-contracts and paying differences as to the balance of the linseed. The result was that after giving the defendant credit for the Rs. 61,000 deposited as margin money and a sum of Rs. 5804 due to him on another account there was due to the plaintiffs Rs. 90,763, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the Courts on the footing that the plaintiffs were employed by the defendant and acted as pakka adatias, and the description in *Bhagwandas v. Canji* (1) of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an up-country constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers. And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts

(1) (1905) I. L. R. 30 B. 205.

done by them unless those acts were unlawful. There is no suggestion that the acts of a pakka adatia as such are unlawful; on the contrary, pakki adati dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a pakka adatia, as that of any one else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description? It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. No such intention has been proved.

Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as pakka adatias of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment. The mere fact that as to the grearer part of the linseed there was no delivery, but an adjustment of claims, cannot alone vitiate the transactions.

The learned judges in appeal were evidently impressed by the statement ascribed to the plaintiff's munim that the delivery of 300 tons was made for the purpose of Court proceedings and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram & Co. Their Lordships, however, attribute no importance to either of these matters. Even if the munim's statement be regarded as proved—a point on which their Lordships are, in the

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circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the Court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the Court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships therefore hold there was no ground for setting aside the decree of the Court of first instance, and they will therefore humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

Solicitors for appellants : *Ashurst, Morris & Crisp.*

AMRIT NARAYAN SINGH APPELLANT ;
 AND
 GAYA SINGH AND OTHERS RESPONDENTS.

J. C.*
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 Nov. 22.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Hindu Law—Widow's Estate—Reversioner's Intcrest—Holder relinquish-
 ing Estate—Invalidity against Minor.*

The next reversioner to an estate held under the Hindu law by a female for her life has no interest in praesenti in the property; until it vests in him he has no interest which he can assign or relinquish, or even transmit to his heirs. The guardian of a minor reversioner consequently cannot bind him by purporting on his behalf to enter into a compromise by which the female holder relinquishes the estate to other relatives; nor is the minor bound by an award or decree made in pursuance of the compromise.

APPEAL from a judgment and decree of the High Court (July 15, 1913) reversing a decree of the Subordinate Judge of Patna.

The suit was instituted by the appellant to recover possession of his share in two mauzas as heir to his grandfather.

The facts and the effect of the decisions in India appear from the judgment of their Lordships.

1917. Oct. 18, 19. *De Gruyther, K.C.*, and *Dube*, for the appellant. Neither the compromise nor the subsequent award and decree are binding upon the appellant. There were no proper proceedings under the Bengal Minors Act (XL. of 1859) appointing the appellant's father as his guardian. It cannot be supposed that the Court allowed the father to represent him under the proviso to s. 3, since the interest of the appellant conflicted with that of his father. In any case the appellant as reversioner had no interest which could be affected by the compromise or the relinquishment of the property : *Sham Sunder Lal v. Acham*. (1) The decision in *Walian v. Banke Behari Prasad Singh* (2), relied upon by the

* *Present*: LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, and SIR LAWRENCE JENKINS.

(1) (1898) L. R. 25 I. A. 183.

(2) (1903) L. R. 30 I. A. 183.

J. C. High Court, is distinguishable. There the minor's mother represented him in the transaction, and his interests were not prejudiced.

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Dumne, K.C. for the respondents. The appellant's mother claimed to be in possession on behalf both of herself and of the appellant. He was therefore a necessary party to the arbitration. The property was of small value, and it must be assumed that the father, who is described as the appellant's guardian, was allowed to represent him under the proviso to s. 3 of Act XL. of 1859. The decree was properly made and binds the reversioners : *Katama Nachiar v. Raja Mootoo Vijaya*. (1)

Nov. 27. The judgment of their Lordships was delivered by

MR. AMEER ALI. This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu Law. Kar Koer died in 1905, and this action was brought in 1908. The suit is therefore clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent ; they claimed the property both under the general Hindu law as also under some undefined family custom. Their objections were overruled by the revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually

(1) (1863) 9 Moo. I. A. 539, 604.

referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajander Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter a compromise was arrived at, in which also Rajander purported to act both for her and her infant son, the appellant. Under this compromise Kar Koer abandoned in favour of the agnates all right to the immoveable property of her father, receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in the names of herself and her mother. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

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The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the civil Court under the provisions of s. 327 of Act VIII. of 1859 (the law that regulated at the time the procedure of the civil Courts in India) for a decree on the award. The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge. He accordingly dismissed the application of the agnates under s. 327.

They appealed to the District Judge, who apparently considered that as Rajander, her husband, was a party to the compromise her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under s. 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865,

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their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the Courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer; that in any event he was not bound by them. The defendants, on the other hand, among other pleas urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape of the case took on appeal to the High Court. The trial judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamnan at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamnan was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turned solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned judges state thus the questions they had to determine: "(1.) Whether Rajander Singh had power to refer the matter on behalf of his minor son to arbitration; (2.) whether the

plaintiff was properly represented in the proceedings in the civil Court under section 327 of Act VIII. of 1859; and (3.) if he was, whether he can now treat the decree, which was based on the award, as a nullity, and claim possession of these properties at this distance of time."

After answering the first two questions in the affirmative the learned judges decided the third against the plaintiff, and, reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned judges of the High Court have based their judgment. With respect, in proceeding to consider whether Rajander Singh, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake; a Hindu reversioner has no right or interest in praesenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere spes successionis. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajander's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned judges seem also to have lost sight of the fact that the award actually made was based on the compromise; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the learned judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajander could represent his son under the proceedings under s. 327 of Act VIII. of 1859 without a certificate under s. 3 of Act XL. of 1859, on which their Lordships

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desire to express no opinion, it is abundantly clear that the civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration, and that she had similarly consented to the compromise and was therefore bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the dictum of the Judicial Committee in the well-known *Shivagunga Case* (1), where, dealing with the question under what circumstances a decree against the widow may bind the reversioners, the Board expressed itself thus: "that unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the zamindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which, and which alone, a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

¹ 9 Moo. I A 539.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

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Solicitors for appellant : *Watkins & Hunter*.

Solicitors for respondents : *Barrow, Rogers & Nevill*.

METHARAM RAMRAKHIOMAL AND OTHERS . APPELLANTS ;
AND
REWACHAND RAMRAKHIOMAL AND OTHERS. RESPONDENTS.

J. C.*
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Nov. 26.

ON APPEAL FROM THE COURT OF THE JUDICIAL COM-
MISSIONER OF SIND.

Hindu Law—Joint Family—Education at Family Expense—Acquired Property—Mitakshara.

A member of a Hindu joint family governed by the Mitakshara received at the expense of the family an ordinary education suitable to his position as a member of the family. He subsequently became a clerk to a pleader and afterwards a broker; he also carried on a money-lending business. From those occupations, without the employment of the joint family funds, he acquired gains:—

Held, that the gains were not partible as joint family property.
Review of the authorities.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner of Sind (June 24, 1910) affirming a decree of the District Court of Karachi.

The litigation related to property of the value of over Rs. 2,50,000 purporting to be disposed of by the will of 'Shewaram Ramrakhimal, deceased, a member of a joint Hindu family governed by the Mitakshara.

The suit was instituted by the appellants, members of the joint family, against the executors of the will, together with the other

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

J. C. members of the family, for a declaration that the property was
 1917 joint family property over which the deceased had no power of
 disposition.
 ———
 METHARAM
 RAMRAKHIO-
 MAL The facts are stated in the judgment of their Lordships.
 ———
 7.
 REWACHAND The suit was dismissed by the trial Judge, and his decision was
 RAMRAKHIO affirmed upon appeal to the Court of the Judicial Commissioner.
 MAL,
 ———

1917. Oct. 30. *P. O. Lawrence, K.C.*, and *E. B. Raikes*, for the appellants. The onus was upon the executors to establish that the property was not partible : *Luximon Row v. Muller Row*. (1) The deceased having been educated at the expense of the joint family, the gains which he acquired as the result of that education were joint family property. The question depends upon the meaning of the Mitakshara, ch. 1, s. 4, cls. 1, 5, 6. The word there translated "science" by Colebrooke merely means "knowledge"; it is rendered by Sir W. Jones as "learning." The view that gains made through education received at the expense of the family are partible was adopted after a consideration of the texts in *Chalakonda Alasani v. Chalakonda Ratnachalam* (2); that decision was followed in *Durvasula Gangadharudu v. Durvasula Narasammah* (3) and *Bai Manchha v. Nirodamdas Kashidas*. (4) A different conclusion was arrived at in *Dhunookdharce Lall v. Gunput Lall*. (5) The last-mentioned decision has been treated by High Courts in India as approved by the Board in *Pauliem Valloo Chetty v. Pauliem Sooryah Chetty* (6); there have consequently been decisions that where the education has been of a general character the gains are not partible : *Boologam v. Swornam* (7); *Lakshman Megaram v. Jannabai* (8); *Krishnaji Mahadev v. Mero Mahadev* (9); *Lachmin Kuar v. Debi Prasad*. (10) The actual decision of the Board was, however, based upon a finding that the education there under consideration had not been at the expense of the family; the determination of the present question was expressly reserved for future consideration, the observations upon it being obiter. The view that a distinction should be drawn between a general and a

(1) (1831) 2 Knapp, 60.

(2) (1864) 2 Madr. H. C. 56.

(3) (1872) 7 Madr. H. C. 47.

(4) (1869) 6 Bom. H. C. (A. C. J.) 1.

(5) (1868) 10 Suth. W. R. 122.

(6) (1877) L. R. 4 I. A. 109

(7) (1881) I. L. R. 4 M. 330.

(8) (1882) I. L. R. 6 B. 225.

(9) (1890) I. L. R. 15 B. 32.

(10) (1887) I. L. R. 20 A. 435.

special education is not supported by the Mitakshara, nor is there in modern conditions anything which would justify its introduction. If, however, the property in suit was not originally partible, the deceased by the letter of October 1, 1888, brought his personal gains into the joint fund.

De Gruyther, K. C., and O'Gorman (for *E. U. Eddis*, serving with His Majesty's Forces), for the respondents, were not called upon.

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Nov. 26. The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated June 24, 1910, of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated April 3, 1908, of a single judge of that Court exercising jurisdiction as the District Court of Karachi.

The suit in which this appeal has arisen was brought in the Court of the district of Karachi on May 26, 1905, by the appellants here to obtain a declaration that the property which one Shewaram purported to devise by his will and a codicil was the joint family property of Shewaram, the plaintiffs and some of the defendants, and that the will and codicil were inoperative to pass any title to the property. Other reliefs were claimed, to which it is not necessary to refer. The executors of the will were amongst the defendants to the suit.

Shewaram died on May 27, 1899. He had been, and was at the time of his death, a member of a joint Hindu family, which was governed by the law of the Mitakshara. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

The plaintiffs, Metharam and Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhimal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money-lending, and was carried on at Karachi, Seth Ramrakhimal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued and was carried on under the management of the plaintiff Metharam, who was the eldest son.

J. C. Shewaram, who was the second son, was born in or about 1847.
 1917 He was educated at the expense of the joint family at the Govern-
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 METHARAM ment school at Karachi, which in the evidence is referred to as a
 RAM RAKHIO- high school. At that school Shewaram learned to speak and to
 MAL write English. When he was twenty two years old he became a
 ?
 REWACHAND pleader's clerk. He continued to be a pleader's clerk until 1878,
 RAM RAKHIO- when he entered the employment of Messrs. Volkart Brothers. He
 MAL was subsequently in the employment of Messrs. Rose & Co., and in
 ——— October, 1881, he entered the employment of the firm of Charles
 Forbes & Co. as their head broker. With the latter firm he continued
 until he died in 1899. It may be assumed that the knowledge of
 English which Shewaram acquired at the Government school was
 of use to him as a pleader's clerk and in the other employments in
 which he was subsequently engaged. From the savings out of his
 salaries and brokerage, and from the profits which he derived from a
 money-lending business which he personally carried on, he acquired
 a fortune of about Rs. 2,50,000, which is represented by the property
 of which he purported to dispose by his will and codicil. The
 money-lending business which Shewaram personally carried on was
 started by him with capital derived from the savings out of his salary
 as a pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his will and codicil to dispose had been acquired by him as a member of the joint family, and was joint family property of which he could not dispose by will, and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his will and codicil disposed was his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned trial judge fixed the following amongst other issues which are now immaterial:—(2.) Did Shewaram acquire the property in suit with the assistance of joint family funds? (3.) If not, did Shewaram join the property to the common ancestral property?

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained.

nor was it contended before the trial judge that the property in question had been acquired by Shewaram by means of any special or other education. The trial judge, having stated in his judgment that the evidence in the case "covers nearly every year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned counsel who appeared for the plaintiff appellants contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage through the general education which he had received from the joint family funds.

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There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that subject and have called evidence in support of it. The learned judges who heard the appeal considered that the English education received at the Government school at Karachi could not be regarded, for a well-to-do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the trial judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues the Courts below have misconstrued a document in writing. The

J. C. document referred to was a letter which was written by Shewaram
1917 to his brother Metharam, and was as follows :—

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“ My Dear Brother,—I am ready to join my property with the family property, and take my share from it.

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“Dated 1st October, 1888.”

“Shewaram.

The trial judge construed that letter as a conditional offer. “If you will come to partition I shall join my fund to yours” ; implying “If you do not come to partition, I shall not join them ”

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit showing that the joint family fund and Shewaram's self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of October 1, 1888. That story rested solely on the evidence of Metharam and Rewachand, and the trial judge entirely disbelieved it. The judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition and found that the offer was never accepted. The Courts below rightly construed the letter. In their Lordships' opinion Shewaram's letter affords strong evidence that on October 1, 1888, his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had before October 1, 1888, thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the Courts below did the judges misconstrue the letter of October 1, 1888 ; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those Courts that the property in suit was the self-acquired property of Shewaram, and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family the property which he acquired must be attributed to that education, and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in s. 4, ch. 1. Sect. 4 deals with effects which are

not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows :—

“ 1. The author explains what may not [be divided, ‘whatever else is acquired by the co-parcener himself, without detriment to the father’s estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners ; nor what has been gained by science.’ ”

“ 5. He need not give up to the co-heirs what has been gained by him through science, by reading the scriptures, or by expounding their meaning ; the acquirer shall retain such gains.

“ 6. Here the phrase ‘ anything acquired by himself without detriment to the father’s estate ’ must be everywhere understood ; and it is thus connected with each member of the sentence ; what is obtained from a friend, without detriment to the paternal estate ; what is received in marriage, without waste of the patrimony ; what is redeemed of the hereditary estate, without expenditure of ancestral property ; what is gained by science, without use of the father’s goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony ; what is received at a marriage concluded in the form termed *asura* or the like ; what is recovered of the hereditary estate by the expenditure of the father’s goods ; what is earned by science acquired at the expense of ancestral wealth ; all that must be shared with the whole of the brethren and with the father.”

The Sanscrit word which Mr. Colebrooke translated as “ science ” was translated by Sir William Jones as “ learning.”

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the Mitakshara was *Chalakonda Alasani v. Chalakonda Ratnachalam*. (1) That case was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff’s adopted daughter ; the second defendant was the plaintiff’s natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family, of gold and silver jewels and other personal property which represented

(1) 2 Madr. H. C. 56.

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gains of the first defendant in her calling of dancing girl; she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

Mr. Collett, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanscrit texts, as translated, including the texts of the Mitakshara, Manu, Yajnavalkya, Narada, and the Dayabhaga and the works of some modern writers on Hindu law, said: "I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion; but I think that the true position is that the mere fact of a Hindu having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition; if there is none such, then the acquisition does not become joint property." Mr. Collett made a decree in favour of the defendants with the exception of the house utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. Phillips and Holloway JJ. in their judgment in the appeal said: "We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family"; and they allowed the appeal.

In *Dhunookidharc Lall v. Gunput Lall* (1), which was decided by the High Court of Bengal in 1868, the defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged to the joint family, and L. S. Jackson and Dwarkanath Mitter JJ. in appeal dismissed the suit. Dwarkanath Mitter J. added: "His" (the plaintiff's)

(1) 10 Suth. W. R. 122.

"case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it."

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In *Bai Manchha v. Narotamdas Kashidas* (1), which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a vakil and as a money-lender, and it was held by Couch C. J. and Newton J. that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. Those learned judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani v. Chalakonda Ratnachalam*. (2)

In *Durvasula Gangadharudu v. Durvasula Narasammah* (3) which was decided by the High Court of Madras in 1872, it was proved that a vakil had received from his father nothing more than a general education, and it does not appear that the vakil was distinguished by his professional learning. Kindersley J. considered that the fair presumption was that such attainments as the vakil possessed had been acquired with the assistance of the family means, and, that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the vakil were subject to partition. The judgment of Kindersley J. suggests that he considered that if the professional gains of the vakil had not been merely the result of the general education which he had received at the expense of joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. Holloway J. entertained no doubt that the fund representing the professional earnings of the vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani v. Ratnachalam* (2), and especially to the statement in that case that the ordinary gains of science by one who has received a family maintenance are certainly partible,

(1) 6 Bom. H. C. (A. C. J.) 1.

(2) 2 Madr. H. C. 56.

(3) 7 Madr. H. C. 47.

J. C. and concluded his judgment by observing, "I do not believe,
 1917 moreover, that within the meaning of the authorities the vakil's
 business is matter of science at all." Apparently Holloway J.
 METHARAM regarded the learning in the law required by a vakil of his day as
 RAMRAKHIO- inferior to the science necessary to her success in her line of life of an
 MAL Indian dancing girl.
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— In *Pauliem Vallo Chetty v. Pauliem Sooryah Chetty* (1), which came before this Board in 1877, the Board, on the evidence, found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the *Mitakshara*, ch. 1, ss. 4, 6, 7, and 8, and the decisions in *Chalakonda Alasani v. Chalakonda Ratnachalam* (2), *Dhunookdharce Lall v. Gunput Lall* (3), *Bai Manchha v. Narotamdas Kashidas* (4), and *Durvasula Gangadharudu v. Durvasula Narasammah* (5) were referred to in argument before the Board, and their Lordships with reference to them observed: "it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of Sutherland's Weekly Reporter, in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in Madras, the first being to the effect that a woman adopting a dancing girl and

(1) L. R. 4 I. A. 109.

(3) 10 Suth. W. R. 122.

(2) 2 Madr. H. C. 56.

(4) 6 Bom. H. C. (A. C. J.) 1.

(5) 7 Madr. H. C. 47.

supplying her with some means of carrying on her profession was entitled to share in her gains ; and the second, to the effect that the gains of a vakil who has received no special education for his profession are to be shared in by the joint family of which he is a member; decisions which have been to a certain extent also acted upon in Bombay. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras."

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That intimation appears to have had its effect upon Courts in India.

In *Boologam v. Swornam*(1), which was decided in 1881, Innes and Kernan JJ. on the evidence having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family funds, held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram v. Jamnabai* (2), which was decided in 1882, Melvill and Kemball JJ. who considered that the dictum of Mitter J. in *Dhunookdharee Lall v. Gunput Lall* (3), that the Hindu law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping-stone of all science," and consequently that the property which was acquired by a subordinate judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev v. Moro Mahadev* (4), which was decided in 1890, Birdwood and Candy JJ. held that the gains made as karkuns by two members of a joint Hindu family who had received

(1) I. L. R. 4 M. 330.

(2) I. L. R. 6 B. 225.

(3) 10 Sath. W. R. 122.

(4) I. L. R. 15 B. 32.

J. C. only a rudimentary education at the expense of the joint family
1917 were their self-acquired property.

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In *Lachmin Kuar v. Debi Prasad* (1) Burkitt and Dillon JJ. in 1897 approved of the decision in *Krishnaji Mahadev v. Moro Mahadev* (2), and, following it, held that the gains from employment in the Commissariat Department of a member of a joint Hindu family, who was not shown to have had any assistance from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India, or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family who had been educated at the expense of the joint family are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanscrit word used in the Mitakshara which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the Courts in India. It gives the Sanscrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the Mitakshara, Vijnanesvara, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wide and more comprehensive meaning "learning."

In construing the texts of the Mitakshara which their Lordships have quoted it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara, who was construing and explaining the more ancient texts of the Hindu

(1) I. L. R. 20 A. 465.

(2) I. L. R. 15 B. 32.

law for the benefit and guidance of the Hindu community, could not have intended to penalize an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalize and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art or science, or in a profession. He must have been writing of education—learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities, and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for the contention in this case that the gains made as a clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds, by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self acquired property. The question of whether a man who, happening to be a member of a joint family, carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Drake, Son & Parlon.*

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by the High Court. The learned judges (Miller and Tyabji JJ.) found that the appellant had been duly represented in the proceedings, his guardian having made an application therein, and held that the appellant was bound by the sale. They were of opinion that though the decree was not strictly in accordance with the provisions of the Transfer of Property Act, 1882, ss. 88 and 89, it was effective against the parties, and that s. 99 of that Act did not apply. They further held that the sub-purchasers were bona fide transferees for consideration within s. 96 of the Trusts Act (II. of 1882), and were not affected by any trust which might have arisen.

J. C.

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1917. Dec. 14. *Sir William Garth*, for the appellant. The attachment and the sale were made upon the decree of April, 1886, which was set aside against the appellant. He was not bound by the sale and is entitled to redeem. Further, neither of the decrees was in accordance with the provisions of the Transfer of Property Act, 1882, in that there was no decree giving the mortgagor six months to pay, as required by ss. 86 and 88, and no decree absolute for sale under s. 89. The decree and sale were consequently nullities and did not affect the appellant's right to redeem. As no title whatever passed as against the appellant the sub-purchasers could gain no title under s. 96 of the Indian Trusts Act, 1882. [Reference was also made to *Khiarajmal v. Daim* (1); *Rashid-un-nisa v. Muhammad Ismail Khan* (2); *Mallikarjunadu v. Lingamurti Pantulu* (3); Transfer of Property Act (IV. of 1882), ss. 58 (b), 60, 85, 99; and Code of Civil Procedure (XIV. of 1882), ss. 287, 288.]

Sir Erle Richards, K.C., and *Kenworthy Brown*, for the first respondent. The sale took place under the decree of November, 1886, which was substituted for that of April. It is not material that the attachment was at an earlier date, there being a decree for sale made by a Court having jurisdiction. If there was an irregularity no substantial injury was sustained, and under s. 311 of the Code of 1882 it did not vitiate the sale. All parties knew what was being sold; the substance of the transaction must be looked at: *Sripat Singh v. Tagore*. (4) So, too, any departure from the form

(1) (1904) L. R. 32 I. A. 23, 33,
35.

(2) (1909) L. R. 36 I. A. 168.

(3) (1902) I. L. R. 25 M. 244.

(4) (1916) L. R. 44 I. A. 1.

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required by the Transfer of Property Act is now immaterial, since the sale was under an order of a competent Court. Further, no fresh suit to set aside the sale lies. The minors were parties to the suit and under s. 244 of the Code of 1882 could only question the sale by application to the Court executing the decree: *Prosunno Coomar v. Kasi Das Sanyal*. (1) Upon the grant of a certificate under s. 316 the title of the purchaser became absolute.

[They were stopped.]

Sir William Garth, in reply, referred to *Thakur Barmha v. Jiban Ram*. (2)

Dec. 14. The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree of the High Court at Madras dated February 17, 1914, which affirmed a decree dated February 9, 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on November 16, 1907, to redeem three mortgages dated respectively December 12, 1876, January 7, 1879, and May 10, 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, was born. The mortgage of January 7, 1879, was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of December 12, 1876, and May 10, 1881, vested by assignment in the vakil. The plaintiff in this suit was born in September, 1881; his brother was born in May, 1882.

On March 19, 1886, the vakil brought in the District Court of North Arcot, a suit for sale on the mortgage of May 10, 1881, against the plaintiff's father the plaintiff, aged four years, and his brother, aged three years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the Court as "Original Suit No. 5 of 1886." Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and on April 15, 1886, made a decree in the following terms: "It is ordered that plaintiff do recover Rs. 10,891, together

(1) (1892) L. R. 19 I. A. 166.

(2) (1913) L. R. 41 I. A. 38.

with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property." That decree was doubtless intended to be in compliance with the provisions of the Transfer of Property Act, 1882, but it did not comply with those provisions.

J. C.

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On August 16, 1886, the vakil presented to the District Court his petition, under s. 230 of the Code of Civil Procedure, 1882, for execution of the decree of April 15, 1886. The petition was entered on the files of the Court as "Execution Petition No. 57 of 1886 in O. S. (Original Suit) No. 5 of 1886," and by it the petitioner prayed "that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed." In that petition the present plaintiff and his brother were described as minors, defendants "by their guardian the first defendant." In the schedule the vakil disclosed the fact that there existed the mortgages of December 12, 1876, and January 7, 1879. On August 18, 1886, the warrant of attachment was issued, and on September 13, 1886, a notice of sale was issued.

On September 28, 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of April 15, 1886, set aside on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt in respect of which the mortgage of May 10, 1881, had been given was not one which the minors or the properties were liable to discharge. On November 10, 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of April 15, 1886, as against them. Govindaraju was ordered to put in a written statement on November 15, 1886, on behalf of the minors, but he failed to do so and did not appear. On November 15, 1886, the District Judge made a decree that the plaintiff (the vakil) "do recover Rs. 10,891, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally

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and by sale of the mortgaged property." That decree did not comply with the provisions of the Transfer of Property Act, 1882, but it was not appealed from and it became final. It was obviously intended to be in supersession of the decree of April 15, 1886, and must be regarded as having superseded that decree.

On January 24, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under s. 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in O. S. No. 5 of 1886, application No. 57 of 1886, and proclaimed that "Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title, and interest possessed by the above defendants alone in respect of that property shall be sold." "So far as appears from the documents in the record, the only attachment which had issued was that of August 18, 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on December 20, 1886, in original suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between January 24, 1887, and March 2, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in original suit No. 5 of 1886. That application was dismissed by the High Court on August 1, 1887.

On February 28, 1887, the District Court made an order permitting the vakil to bid at the sale. On September 19, 1887, the immovable properties in question were sold, subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on December 13, 1887, and he on February 1, 1888, gave the sale certificate under his

hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May, 1894. The plaintiff's brother died in September, 1904. The present plaintiff, his brother and their father, had constituted a Hindu joint family.

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On behalf of the appellant here it was contended that the sale took place in execution of the decree of April 15, 1886, and not in execution of the decree of November 15, 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of August 18, 1886, was made under the decree of April 15, 1886. The sale must have been under the decree of November 15, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of January 24, 1887, was made subsequent to the decree for sale of November 15, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title, and interest in the property of the defendants to the suit of March 19, 1886, and the certificate of sale shows that the right, title, and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of November 15, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of the Transfer of Property Act, 1882, were not complied with in the suit for sale of March 19, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of March 19, 1886, were not debarred from a right to redeem. It appears to their Lordships that the answer to that contention is that, whether or not the provisions of the Transfer of Property Act, 1882, were complied with, the property and all right, title, and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had

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1917 and that decree was not appealed.

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By s. 244 of the Code of Civil Procedure, 1882, it was enacted that:
“The following questions shall be determined by order of the Court
executing a decree and not by a separate suit (namely):—... ..
(c) Any other question arising between the parties to the suit in
which the decree was passed, or their representatives, and relating
to the execution, discharge, or satisfaction of the decree, or to the
stay of execution thereof.”

This Board decided in *Prosunno Coomar Sanyal v. Kasi Das Sanyal* (1) that s. 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of November 15, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed. The appellant must pay the costs of this appeal.

Solicitor for appellant : *Douglas Grant*.

Solicitors for first respondent : *Chapman-Walker & Shephard*.

(1) L. R. 19 I. A. 166.


ADVOCATE

REHMAT-UN-NISSA BEGAM AND OTHERS . . . APPELLANTS; . C.*
 AND
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 Dec. 13.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

*Partnership—Agreement—Agreed Duration of Partnership—Business at
 a Loss—Decree for Dissolution—Discretionary Power of the Court—
 Indian Contract Act (IX. of 1872), s. 252; s. 254, sub-s. 6.*

By the Indian Contract Act, 1872, s. 252, "Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them....." By s. 254, "At the suit of a partner the Court may dissolve the partnership in the following cases:—..... (6.) when the business of the partnership can only be carried on at a loss."

A partnership agreement for the supply of stone for the construction of a dock provided that the partnership should continue until the completion of the supply for the works. Before that event one of the partners sued for a dissolution and established that the business could only be carried on at a loss:—

Held, that the trial judge had a discretionary power to decree a dissolution, and that, he having ordered a dissolution neither capriciously nor without disregard of any legal principle, the exercise of the discretion was not open to review upon appeal.

APPEAL from a judgment and decree of the High Court (September 8, 1914) varying a decree of Macleod J. (March 28, 1914).

The suit was instituted in the High Court by the Nawab Kamal Khan (now represented by the appellants) for a decree that a partnership between himself and the respondents, constituted by an agreement dated March 11, 1908, be dissolved, and for accounts.

The facts appear from the judgment of their Lordships.

Macleod J. found that the partnership business could only be carried on at a loss; he decreed a dissolution from the date of the institution of the suit and made certain declarations as to the effect of the agreement as to the respective rights upon taking the accounts.

The present respondents appealed and the appellants cross appealed.

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE JENKINS.

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Sir Basil Scott C. J. and Davar J. varied the decree. They held that the plaintiff was not entitled to sue for a dissolution of the partnership at the date of the institution of the suit, nor until the completion of the construction of the works, since the partnership agreement provided that the partnership should continue until that event. The works, however, being completed at the date of the decree, the partnership accounts were ordered; the decree of Macleod J. as to the respective rights of the parties was also varied.

1917. Nov. 13, 15. (1) *Upjohn, K. C.*, and *Sir William Garth*, for the appellants. It was proved that the business could not be carried on at a profit and the trial judge had a discretion under s. 254, sub-s. 6, of the Indian Contract Act, 1872, to order a dissolution. That discretion was not taken away by the agreement of the parties: *Lindley on Partnership*, 8th ed., p. 658. In *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (2) the Board held merely that the partners might by their agreement renounce the right to a dissolution. There was nothing in the conduct of the Nawab which disentitled him to the equitable assistance of the Court and the discretion was properly exercised.

P. O. Lawrence, K.C., *De Gruyther, K.C.* and *E. B. Raikes*, for the respondents. The Court had not a discretionary power under s. 254, sub-s. (6) to dissolve the partnership since the evidence did not show that the business could not be carried on at a profit. In any case, having regard to the circumstances in which the partnership was entered into, it would be inequitable to the respondents to decree a dissolution before the completion of the works.

Upjohn J. C., in reply.

Dec. 13. The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. This is an appeal from a decree of the High Court at Bombay in its appellate jurisdiction, dated September 8, 1914, varying a decree of that Court in its original jurisdiction passed on March 28, 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab Kamal Khan, but he has died in the course of the suit and the present appellants are his

(1) The arguments as to the right to a dissolution are alone reported.
(2) (1876) L. R. 3 I. A. 200.

representatives. The defendants, his partners, are the respondents in this appeal. The partnership was constituted on March 11, 1908, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay, and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them the Nawab was either directly or indirectly interested.

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For reasons which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

In the end an arrangement was made for cancellation of the two contracts and the release of all claims for their breach by the Nawab and those interested with him, and for the formation of a new partnership between the Nawab and the defendants for the quarrying and supply of the requisite granite and other stone. The defendants insisted that the Nawab should be a sleeping partner without any voice in the control and conduct of the business, so his advisers naturally demanded the insertion in the partnership instrument of a provision which would secure him against the risk of extravagant working. To this the defendants assented, and a clause was inserted which ultimately became the 25th in the instrument as executed. It is this clause that has given rise to much of the present dispute.

In the instrument, which is expressed to be made between the Nawab of the one part and the defendants (thereinafter called the contractors) of the other part, after a narrative of the events leading up to the partnership, it is recited that "for the purpose of carrying out the said terms and conditions and of working the said quarries and producing stone and granite therefrom, and rendering the said quarries remunerative and profitable to the parties thereto, and in consideration of the advances to be made by the contractors," it had been arranged that the agreement should be entered into.

The instrument then provided that the Nawab and the defendants

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should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half (clause 1); that the granite and stone produced from the quarries should be furnished to the defendants for their works at the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (clause 3); that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4); that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent. on the cost of the work, including all charges (clause 17); that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22); and (clause 25) "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent." The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss, which amounted to upwards of three lakhs of rupees on June 30, 1910. In these circumstances the present suit was instituted in October, 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

In the plaint extravagant charges of fraud were made, but they have been abandoned. While groundless charges of this type are to be deprecated, and may well attract the consequence of an adverse order as to costs, their Lordships cannot accede to the suggestion, somewhat faintly made, that the Nawab had by these charges forfeited his right to the protection of the Court if he otherwise had a good cause of action.

The matters now in contest are (1.) whether the suit is premature; (2.) what is the "average rate of expense" mentioned in clause 25 of the partnership instrument; and (3.) have there been "extraordinary circumstances" within the meaning of that clause?

The Court of first instance decided in the Nawab's favour on the first and second of these points, and adversely to him on the third.

The appellate Bench's decision was wholly adverse to the Nawab, but as the work on the docks had been completed before the hearing of the appeal, the Court directed that partnership accounts should be taken from March 11, 1908, up to the end of the construction work of the docks.

The Court of Appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution was based on the continuance of the partnership involved in the terms of the partnership agreement and on s. 252 of the Indian Contract Act. And the Court proceeded to express the opinion that, even if it had jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

It is beyond controversy that at the institution of this suit the business of the partnership could only be carried on at a loss. This is conclusively shown by the firm's balance-sheets, the profit and loss account for the period from March 1, 1908, to June 30, 1912, and the admission in the defendants' written statement. The condition described in s. 254, sub-s. 6, of the Indian Contract Act, 1872, is thus established, and it is provided that in this event the Court may, at the suit of a partner, dissolve the partnership. What, then, is there in the circumstances of this case to deprive the Court of its jurisdiction or the plaintiff of his right to seek the Court's assistance?

Their Lordships are unable to agree with the High Court's view that there is anything in s. 252 that constitutes a bar; it appears to them to be directed to something wholly different. A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the Court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the Courts, and yet, if the

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view of the appellate Bench is to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will ; it is to meet that precise predicament that the Court's power to decree dissolution is conferred in the events enumerated in s. 254. For a partnership terminable at will no such provision would be required.

Their Lordships therefore are unable to affirm the decision of the appellate Bench as to the competence of the suit. But this leaves open the question whether the Court's discretion should be exercised for or against the Nawab's claim. The appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the appellate Bench as it is before this Board. And yet the appellate Bench did not hesitate to express its readiness to substitute its discretion for that of the original Court, although in the view it took of the Court's jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners.

Their Lordships therefore hold that there is no sufficient ground for disturbing the original decree so far as it pronounced for a dissolution.

[Their Lordships' judgment then dealt with the questions as to the "average rate of expense" and "exceptional circumstances"]

under clause 25, and upon the evidence agreed with the judgment of the appellate Bench, and concluded as follows :]

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the Appeal Court should be set aside and that of the original Court restored, with the variations following (1)

Their Lordships recommend an order in the above form, as they do not wish to interfere with the discretion exercised by the original Court in its direction as to costs ; and, as to the costs of this appeal, and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Grundy, Kershaw, Samson & Co.*

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DEBENDRA NATH DAS APPELLANT ;
AND
BIBUDHENDRA BHRAMARBAR ROY RESPONDENT.

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Feb. 7.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land Tenure in Bengal—Tenure-holder or Raiyat—Area exceeding a Hundred Bighas—Presumption—Cultivation by Underlessee—Bengal Tenancy Act (VIII. of 1885), s. 5, sub-ss. 1, 4, 5.

A reclamation lease of over 250 standard bighas of land, to which the Bengal Tenancy Act, 1885, applied, gave to the tenant an unfettered option as to the means by which the land should be brought under cultivation. He underleased it to a neighbouring landowner, leaving it to the underlessee's discretion what agency should be employed for that purpose:—

Held, that the presumption, arising under s. 5, sub-s. 5, of the Act, that the tenant was a tenure-holder and not a raiyat, since the area exceeded 100 standard bighas, was not rebutted under

* *Present*: LORD BUCKMASTER, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

(1) The variations of the decree allowed under clause 25; the details were as to the amounts to be are not material to this report.

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the circumstances of the case by having regard, as directed by sub-s. 4 (b), to the purpose for which the tenancy right was originally acquired.

APPEAL from a judgment and decree of the High Court (July 11, 1913) reversing a decree of Richardson J.

The suit was instituted in the Court of the Settlement Officer of Dompara by the respondent (a minor suing by a manager appointed by the Court of Wards) against the appellant. It was claimed that an entry in the record of rights prepared by the Assistant Settlement Officer under the Bengal Tenancy Act, 1885, was erroneous, in that it recorded the status of the tenant under a lease granted by the respondent in 1901, and assigned to the appellant in 1907, as that of a raiyat and not that of a tenure-holder.

The facts of the case, together with the material terms of the lease and the relevant provisions of the above Act, appear from the judgment of their Lordships.

The High Court, upon appeal under the Letters Patent, held, reversing Richardson J., that the tenant was a tenure-holder. The learned judges (Jenkins C. J. and Mookerjee J.) said that, the area being over 100 standard bighas, it was to be presumed under s. 5, sub-s. 5, that the tenant was a tenure-holder unless the contrary were shown. The terms of the lease negatived the contention that the intention was that the land should be reclaimed and subsequently be cultivated by the tenant himself. The word "primarily" in the definition of a raiyat in s. 5, sub-s. 1, indicated that the definition was not an exclusive definition; it was possible for a person to be a tenure-holder although a part of the land was intended to be, and was, cultivated by himself. Here the land was cultivated by undertenants. They were, therefore, of opinion that the presumption had not been rebutted. They further said "On the other hand, there are indications in the lease itself that the grant could never have been intended to be a raiyati grant. In the first place, the grant was for the purpose of reclamation, and the grantee was expected to reclaim the land at his own expense. His position consequently would hardly be intended to be as precarious as that of a non-occupancy raiyat. In the second place, there was a period of remission fixed, during which no rent was to be paid on account of the land itself; this is a term which usually finds place in leases

of tenures. In the third place, the rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor. Taken as a whole, the lease, in our opinion, makes it reasonably plain that the grant was intended to be that of a tenure. . . . The view we take is supported by the observation of Lord Davey in the case of *Gokul Mandar v. Pudmanund Singh*." (1)

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1917. Dec. 7. *De Gruyther, K.C.*, and *Sir William Garth*, for the appellant. The appellant is a raiyat and not a tenure-holder. The test is the primary purpose for which the right of tenancy was originally acquired : Bengal Tenancy Act, 1885, s. 5, sub-ss. 1, 4 ; *Durga Prosumno Ghose v. Kali Das Dutt* (2) ; *Laidley v. Gour Gobind Sarkar*. (3) Here the primary purpose was cultivation by hired labour, although the lease allowed the tenant to cultivate by raiyats or otherwise. It is unlikely that the tenant intended to become a tenure-holder, because in that case any person he put in would have been a raiyat with all the rights of raiyatwari occupation. The Board in *Gokul Mandar v. Pudmanund Singh* (1) merely gave effect to the presumption under s. 5, sub-s. 5, there being no indication that the purpose was to acquire raiyat tenure. The respondent should have objected to the record of rights prepared under ss. 101, 102 and 105, by which the tenant's status was recorded as that of a raiyat. Not having done so this suit was not competent.

[LORD BUCKMASTER. The last contention was not raised in the Courts below, nor is it raised by the appellant's case ; it is therefore not open.]

Sir Erle Richards, K.C., and *O'Gorman*, for the respondent, were not called upon.

1918. Feb. 7. The judgment of their Lordships was delivered by

MR. AMEER ALI. The sole question involved in this appeal is whether the defendant-appellant is a tenure-holder or is a raiyat as defined in the Bengal Tenancy Act (VIII. of 1885).

The defendant holds over 250 acres of land in the village of Goyalbank, forming part of the plaintiff's zamindari in the district

(1) (1902) L. R. 29 I. A. 196.

(2) (1881) 9 Cal. L. R. 449.

(3) (1885) I. L. R. 11 C. 501.

J. C. of Cuttack, under a lease granted by the predecessor of the plaintiff
 1918 in 1901 to one Gokulananda Chowdhury. In 1907 Gokulananda
 DEBENDRA assigned the lease to the defendant. The land covered by the lease
 NATH DAS became about the same time the subject of "record of rights"
 2. proceedings instituted by Government under ch. 10 of the Act.
 BIBUDH- Those proceedings are taken by the Revenue authorities before
 ENDRA special officers for the ascertainment and record of all rights con-
 BHRAM- nected with the land within the ambit of the inquiry. At the initial
 ARBAR ROY. stage of the proceedings the defendant was entered as a "tenure-
 holder," but subsequently on his objection the Assistant Settlement
 Officer recorded him as "a settled raiyat at a fixed rent."

The present suit has been brought under the provisions of s. 106 on behalf of the zamindar for rectification of the entry by recording the defendant as a "tenure-holder." The suit was first heard by the Settlement Officer, who upheld the plaintiff's contention as to the status of the defendant, and his decision was confirmed on appeal by the Special Judge of Cuttack. The defendant then preferred a second appeal to the High Court of Calcutta, which came for hearing before Richardson J. The defendant renewed before that learned judge his contention that under the terms of his lease he was entitled to be classed as a raiyat. Richardson J. accepted his contention and reversed the order of the Special Judge, the effect of which was that the entry in record of rights remained as made by the Assistant Settlement Officer.

An appeal was thereupon preferred by the respondent under s. 15 of the Letters Patent, which came on for hearing before two judges of the High Court, Jenkins C. J. and Mookerjee J., who, differing from Richardson J., held, in concurrence with the Settlement Officer and the Special Judge, that the defendant was a tenure-holder. They accordingly reversed the order of that learned judge, and restored the decree of the lower Courts for the rectification of the entry in the record of rights.

The present appeal to His Majesty in Council, which forms the sixth stage of this litigation, is an indication not merely of the persistency of the defendant, but also of the valuable rights that are attached to his claim, for, if he be a tenure-holder, persons holding under him would have the status of raiyats and would be entitled to acquire, after a certain efflux of time, the right of occupancy

under the Act. Whereas if he be a raiyat, those persons would only be under-raiyats without the privileges or security afforded by the Act to raiyats.

For the purposes of the Tenancy Act, tenants are classed under three heads—namely, tenure-holders, raiyats, and under-raiyats, that is to say, tenants holding, whether mediately or immediately, under-raiyats. Raiyats, again, are divided into three sub-classes—i.e., (a) raiyats holding at fixed rates, (b) occupancy raiyats, and (c) non-occupancy raiyats. The defendant has been entered as a settled raiyat at a fixed rent, evidently on the ground that under the lease the rent payable by him is permanently fixed. But it is to be observed that fixity of rent is no criterion for the determination of the point at issue, for a tenure may be held at a fixed rent equally with a raiyati holding. The question must, therefore, be decided on other considerations.

Sect. 5, sub-s. 1, defines a tenure-holder to mean “Primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes all the successors in interest of persons who have acquired such a right.” And a raiyat is defined to mean “Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.”

Sub-s. 4 provides certain rules for determining whether a tenant is a tenure-holder or raiyat. Clause (b) is important: it says, “The Court shall have regard to the purpose for which the right of tenancy was originally acquired.” Sub-s. 5 is equally important. It provides that where the area held by a tenant exceeds 100 standard bighas (a little over 33 acres) “the tenant shall be presumed to be a tenure-holder until the contrary is proved.” In determining the status, therefore, of a tenant, namely, whether he is a tenure-holder or a raiyat, two elements have to be borne in mind, first, the purpose for which the land was acquired, and, secondly, the extent of the tenure or holding. A close examination of the definition clauses makes it quite obvious that both these elements are closely inter-related. The law assumes the raiyat to be the actual cultivator of

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v.

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the soil, either by his own labour or the labour of members of his family or by hired labourers, and it assumes also that ordinarily a larger area than 100 bighas would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-s. 5 of s. 5 is founded on that hypothesis.

In the present case the land held by the defendant amounts to more than 250 acres ; the statutory presumption certainly applies to him. He seeks to rebut it by referring to the purpose for which the lease was granted. The terms of the document have been carefully examined by the Settlement Officer, the Special Judge, and the High Court. Their Lordships will therefore confine their remarks to its general features. It is an ordinary reclamation lease ; it leases the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts. In other words, he is to reclaim the land at his own expense and bring it under cultivation. The sixth clause makes this quite clear. It says : " You shall, by reserving water and raising bandhs (on the land leased), make it fit for cultivation according to your will, and shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangement or adopt such other convenient steps as you consider necessary for cultivating the same."

The employment of the agency for the cultivation is left entirely to the option of the lessee ; the land was leased for cultivation, that is, for agricultural purposes, but the agency to be employed is to be determined by the lessee ; he has the power to establish raiyats or under-lease it to others, or cultivate it himself, if he can. It cannot be said that the purpose is, primarily or otherwise, that the demised land should be cultivated by his personal agency. At the best the lease may be said to be equivocal. In their Lordships' opinion the High Court and the lower Courts were perfectly right to look to the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. Apart from the facts appearing in the lease to which the learned judges of the High Court have referred as indicating that the land was being taken for purposes other than that of personal and direct cultivation as a raiyat, there is the outstanding circumstance that the land was leased to a man of means who

appears to be a resident of another place for the purpose of reclama-
tion and rendering fit for cultivation, the agency to be employed for
carrying on the cultivation being left to his discretion.

Their Lordships think that the presumption under s. 103B, on
which the defendant relies, that an entry in a record of rights finally
published "shall be presumed to be correct until it is proved by
evidence to be incorrect," is fully rebutted by the circumstances to
which the Courts in India have referred in arriving at the conclusion
that the defendant was a tenure-holder and not a raiyat.

Their Lordships are of opinion that this appeal should be dismissed
with costs, and that they will humbly advice His Majesty accordingly.

Solicitor for appellant : *E. Dalgado.*

Solicitor for respondent: *The Solicitor, India Office.*

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IMAMBANDI AND OTHERS APPELLANTS ;
AND
MUTSALDI AND OTHERS RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Mahomedan Law—Minors—Guardianship—Alienation by Mother—
Invalidity — Marriage — Legitimacy—Acknowledgments—Admission
of Documents—Code of Civil Procedure (V. of 1908), Order XIII.,
r. 1.*

Under Mahomedan law a mother has no power as de facto
guardian of her infant children to alienate or charge their
immovable property.

During a father's life he is the legal guardian of his minor
children though the mother has rights as to their custody; after
his death, his executor (in Sunni law) is their legal guardian, or, if
there is no executor, their grandfather, or if he be dead, his executor.
In the absence of any legal guardian the duty of appointing one
devolves upon the judge as representing the Sovereign. If the
mother is the father's executor, or has been appointed, she has the
powers of a legal guardian, but those powers are subject to strict

* *Present*: LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, MR.
AMEER ALI, SIR WALTER PHILLIMORE, BART., and SIR LAWRENCE
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conditions as to immovables. If there is no legal guardian, the person in charge of a minor (such as the mother) has power as de facto guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities (such as food, clothing or nursing), but has no power to deal with the immovable property.

Ayderman Kutti v. Syed Ali (1912) I. L. R. 37 M. 514 disapproved.

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother.

Rule as laid down in *Mahatala Bibee v. Prince Ahmed Haleem-ooz-Zaman* (1881) 10 Cal. L. R. 293 applied.

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order XIII., r. 1, may be admitted at a later stage at the discretion of the Court.

APPEAL from a judgment and decree of the High Court (August 30, 1911) affirming a decree of the second Subordinate Judge of Saran.

By a registered deed of sale dated June 10, 1906, and made in consideration of Rs. 10,000, Enayet-uz-Zohra (respondent No. 3) purported to convey to the first two respondents the shares of herself and of her minor son and daughter (respondents Nos. 4 and 5) in the property inherited by them respectively from Ismail Ali Khan, deceased. The deed was expressed to be made by the mother on behalf of herself and as guardian of her two minor children, but she had not been appointed their guardian under the Guardian and Wards Act (VIII. of 1890). Zohra claimed that she had been married to the deceased, a Mahomedan of the Sunni sect, and that her said children were his legitimate children. An application by the transferees for registration was opposed by the widows of the deceased (appellants Nos. 1 and 5), who applied for registration in the names of themselves and their children. The former application was rejected and the latter allowed, and that decision was subsequently affirmed by the Collector and Commissioner.

On March 25, 1909, the first and second respondents instituted the present suit against the appellants, namely the two admitted widows and their minor children, and joined as defendants also Zohra and her minor children. The claim in the plaint was for a declaration that Zohra was the nikahi wife, and her children the legitimate children of Ismail Ali Khan; that the property in suit was inherited by them, according to their respective shares, as his

heirs; and that the defendants had no rights in the purchased property. It was further prayed that the plaintiffs might be given possession under the deed of sale and have a decree for mesne profits.

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The following, amongst other, issues were settled: (4.) Is the defendant No. 8, namely Zohra, the married wife, and are the defendants 9 and 10, namely her children, the legitimate children, of Ismail Ali Khan? Were they acknowledged by him as such? (5.) Is the sale deed dated June 10, 1906, valid, and does it confer any title on the plaintiffs? Whether the contesting defendants can question the transfer? (8.) Of what properties the plaintiffs are entitled to recover possession?

The trial judge on the fourth issue found in favour of the plaintiffs, and on the fifth issue he found that the deed was duly executed. He made declarations as prayed and a decree for possession.

An appeal to the High Court was dismissed. The learned judges (Mukerji and Carduff JJ.), after a full examination of the evidence, confirmed the finding of the trial judge upon the fourth issue. On the fifth issue they said that the question whether Zohra as de facto guardian of her children was competent to alienate their shares did not properly arise in the suit, since the appellants did not claim through the children but repudiated their claim.

A question arose in both Courts as to the admissibility and value of certain account-books. The manner in which that question was dealt with appears from the judgment of their Lordships.

1917. Nov. 22, 23, 26, 27, 28. *Upjohn, K. C.* and *Abdul Majid* for the appellants. The Courts in India wrongly excluded the books of account tendered in evidence by the appellants. Had due weight been given to them they would have rebutted the presumption (if any) arising from the alleged acknowledgments. The concurrent findings of fact consequently are not conclusive: *Gabindsundari v. Jagadamba*. (1) The evidence did not establish the alleged marriage ceremony. The requirement of Mahomedan law of an unambiguous acknowledgment before witnesses is a matter of substance and not of evidence: Baillie's Digest (1865 ed.), pp. 4, 5, 7, 749; Baillie's Mahomedan Law of Inheritance (1824), pp. 28, 31; Fatawai

(1) (1870) 6 Beng. L. R. 168 (P. C.).

J. C. Alamgiri, vol. 4, p. 48; *Aklemannessa v. Mahomed Hatem*. (1)
 1918 The evidence as to alleged acknowledgments was not sufficiently
 IMAMBANDI specific as to the person referred to to raise any presumption:
 v. *Ashrufood Dowlah v. Hyder Hossain* (2); *Botoolun v. Koolsoom*. (3)
 MUTSADDI. In any case the mother had no power to alienate her children's
 shares, and the transferees obtained no title to those shares: *Mata
 Din v. Ahmad Ali*. (4)

[LORD SHAW OF DUNFERMLINE. Their Lordships do not require to hear the respondents' counsel upon the questions of the marriage and legitimacy; they desire, however, to hear arguments as to the right to alienate the shares of the minors.]

De Gruyther, K.C., and *Sir William Garth*, for the first and second respondents. In any case the deed was not void as to the minors' shares, but merely voidable; upon attaining their majority they can set it aside if the sale was not for their benefit. In *Mata Din v. Ahmad Ali* (4) upon the facts, which in that case were before the Board, the deed was set aside, there being no necessity nor acquiescence on attaining majority; the question whether an alienation by a de facto guardian is in Mahomedan law void or voidable was expressly not decided. There have been conflicting decisions in India, but the weight of judicial authority favours the view that such an alienation is voidable if not for the benefit of the minors, and not void: *Sita Ram v. Amcer Begam* (5) (the dictum at p. 338 being obiter); *Nizamuddin v. Anandi* (6); *Majidan v. Ram Narain* (7); *Ummi v. Kesho Das* (8); *Syedun v. Vclayet* (9); *Bhutnath v. Ahmed Hossain* (10); *Moyna Bibi v. Banku Bchari* (11); *Mafazzal v. Basid* (12); *Ramcharan v. Anukul* (13); *Hurbai v. Hiraji* (14); *Baba v. Shrivappa* (15); *Pathummabi v. Vittil* (16) (followed in Madras in three decisions (17)). In *Ayderman Kutti v. Syed Ali* (18) the effect of dealings with a minor's property by a de

(1) (1904) I. L. R. 31 C. 849,
856.

(2) (1866) 11 Moo. I. A. 94.

(3) (1876) 25 Suth. W. R. 444.

(4) (1912) I. L. R. 39 I. A. 49.

(5) (1886) I. L. R. 8 A. 324

(6) (1896) I. L. R. 18 A. 373.

(7) (1903) I. L. R. 26 A. 22.

(8) (1908) I. L. R. 30 A. 462.

(9) (1872) 17 Suth. W. R. 239.

(10) (1885) I. L. R. 11 C. 417.

(11) (1902) I. L. R. 29 C. 473.

(12) (1906) I. L. R. 34 C. 36.

(13) (1906) I. L. R. 34 C. 65.

(14) (1895) I. L. R. 20 P. 116.

(15) (1895) I. L. R. 20 B. 199.

(16) (1902) I. L. R. 26 M. 734.

(17) (1907) I. L. R. 30 M. 197;

(1909) 32 M. 276; (1911) 34 M. 527.

(18) I. L. R. 37 M. 514.

facto guardian was fully considered by Abdul Rahim J. with reference to the authorities and Mahomedan law books; the learned judge came to the conclusion that an alienation was not void, but was mauquf, that is in a state of suspense, and that a minor could adopt it on coming of age, in which case the adoption related back.

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[LORD SHAW OF DUNFERMLINE referred to *Amba Shankar v. Ganga Singh* (1) and *Wala Quadar v. Muhammad Azim*. (2)]

The question of the validity of the alienation cannot be raised in this suit. No issue was raised as to whether the alienation was necessary or for the benefit of the minors. They will not be estopped by the decree from contesting the validity of the transfer.

[SIR WALTER PHILLIMORE. The minors were joined as defendants and a decree for possession under the deed was obtained; will they not be estopped?]

The status of the minors is a *res judicata* under the decree; these respondents are prepared to undertake to raise no plea of estoppel upon any future proceedings by the minors as to the validity of the alienation.

1918. Feb. 28. The judgment of their Lordships was delivered by MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Calcutta, dated August 30, 1911, which affirmed the decree of the Subordinate Judge of Saran awarding to the plaintiffs possession of a share in certain landed property situated in that district.

The property in suit belonged originally to one Ismail Ali Khan, a wealthy Mahomedan inhabitant of the sub-division of Siwan in the Saran district. The plaintiffs allege that on his death in March, 1906, he left him surviving three widows and several children, and that from one of these widows named Enayet-uz-Zohra, acting for herself and for her two minor children, they purchased the share in suit for the possession of which they brought the present action.

It appears that shortly after Ismail Ali Khan's death the contesting defendants 1 to 7 applied to the Revenue Courts for mutation of names (as proprietors) in the Collector's records, and, as usually happens in these cases in India, especially in Mahomedan families,

(1) (1905) 9 Oudh Cases, 97.

(2) (1915) 18 Oudh Cases, 168.

J. C. immediately this application was made a claim was put forward on
1918 behalf of Enayet-uz-Zohra and her children that they were equally
IMAMBANLI entitled with the other heirs of Ismail Ali Khan to have their names
v. entered as co-sharers in the estate by right of inheritance, the
MUTSADDI. allegation being that Zohra was one of his lawfully wedded wives
— and that her children were his legitimate issue. The Revenue
Courts rejected her claim, holding that it was not established to
their satisfaction that she was Ismail Ali Khan's married wife or
that the children were his lawful issue. They accordingly made an
order directing the registration of the contesting defendants' names
in succession to Ismail Ali Khan.

It should be mentioned here that the defendants 1 and 5 are
admittedly Ismail Ali Khan's married wives, defendants 2, 3, and
4 are his issue by defendant 1, and defendants 6 and 7 his daughters
by defendant 5.

The plaintiffs are dealers in hides, and also live at Siwan. There
seems to have been litigation between them and Ismail Ali Khan
in his lifetime, and since his death they seem to have espoused
Zohra's cause. The deed executed by Zohra bears date June 10,
1906, and purports to convey to the plaintiffs the shares of both
herself and her minor children, and in the suit they are included as
defendants 8 to 10. The reliefs sought are of a twofold character :
first, a declaration of the title and status of the plaintiffs' vendors ;
and, secondly, a decree in favour of the plaintiffs for possession of
the shares covered by the deed of sale.

The contesting defendants denied, as they had done in the
Revenue Courts, that Zohra was one of Ismail Ali Khan's married
wives or that her children were his legitimate issue, and they
further contended that the shares the plaintiffs claimed to recover
did not pass under the sale. The sixth issue framed by the Subor-
dinate Judge seems to relate to this point.

The plaint was filed on March 25, 1909, but it does not appear
to have been admitted until April 2. The contesting defendants
filed their written statements in July, 1909 ; after that the case
dragged its slow length along until June 18, 1910, when the actual
trial began. In the interim, however, various interlocutory orders
were made, including an order for the appointment of Zohra as
guardian ad litem for her children (though her interest in the

suit was clearly adverse to theirs). Admittedly she was never appointed under the Guardian and Wards Act (VIII. of 1890) a guardian of their property.

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The examination in Court of the plaintiff's witnesses commenced on June 16, 1910 ; on June 18 (the date given in the judgment of the High Court does not appear to agree with the date in the order sheet) they applied for a summons against the defendants for the production of certain bahis, or account-books, belonging to Ismail Ali Khan for the Fasli years 1294 to 1313 (1887—1906). The order on this application was as follows: "I decline to issue summons at this stage." And there, so far as the plaintiffs were concerned, the matter was allowed to rest.

As a large part of the judgments of both the Courts in India is occupied with an examination of whether these bahis are reliable or not, it is necessary to mention that these very books had been produced and filed in Ismail Ali Khan's lifetime on his behalf in the litigation between him and the plaintiffs ; after his death they were returned to the contesting defendants' pleader, when it was discovered that the large number of leaves were abstracted from several of the books. This was represented to the presiding officer of the Court where the books were filed, but there is nothing to show the result of the representation. The plaintiffs' case appears to have closed on June 26, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the bahis. The Subordinate Judge's order on their petition is in these terms: "On the defendants' application filing therewith the bahis from 1294 to 1311 Fasli, it is ordered that they be kept with the records, and that the plaintiffs' pleader be informed accordingly." About this time the missing leaves turned up mysteriously. The trial judge says he received them by post from some unknown source ; and apparently after receipt he handed them to the proper officer. Upon becoming aware of this fact the defendants applied to the Court that the torn-out leaves thus rediscovered might be admitted in evidence ; and on June 29, whilst the trial was proceeding and evidently in the presence of the pleader for the opposite party, the Subordinate Judge ordered that the leaves in question should be used as evidence, and marked them as exhibits.

It is hardly likely that the leaves were originally abstracted by

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the defendants and that this roundabout way was adopted for the purpose of getting the books admitted as evidence. On the face of it the suggestion appears to be absurd.

The use the contending defendants wished to make of the account-books was of a negative character. These books contain regular entries of payments by Ismail Ali Khan to his admitted wives, defendants 1 and 5, under the honorific designation of "haveli kalan" (senior mansion) and "haveli khurd" (junior mansion), being euphemisms for wives. There is no entry, however, of any payment to Zohra. The defendants accordingly asked the Court to draw from the absence of any such entry in her name the inference that she was not Ismail Ali Khan's wife and did not hold the same position as the other ladies. Counsel for the plaintiffs seems to have been greatly impressed by this argument; in fact, he appears to have conceded that, if the books were to be relied upon, Zohra's claim must fail. He was thus driven to challenge their genuineness. The Subordinate Judge appears to have taken the same view; he thought that the books must be first eliminated before the direct evidence could be properly appraised, and this reasoning runs through the judgments of both the Courts in India. The trial judge on certain grounds came to the conclusion that the bahis must be put aside from consideration as unreliable. He then proceeded to discuss the oral testimony; and in the result found that Zohra was in fact a wife of Ismail Ali Khan, and that the defendants 9 and 10 were his children by her. He accordingly decreed the plaintiffs' claim. And his decree has been affirmed by the High Court of Calcutta. The learned judges of the High Court also felt impressed with the absence of entries in the bahis in Zohra's name, and therefore proceeded to deal with them first. This mode of treatment has been strongly assailed, not without reason, before this Board. It seems to their Lordships that the true criterion for the determination of the question at issue was missed by both the Courts. The onus of establishing the title of their vendors lay primarily on the plaintiffs; the evidence furnished by the books was negative and inferential, and in substance directed to the corroboration of the defendants' witnesses, who denied that Zohra was one of Ismail Ali Khan's wives. Order XIII., r. 1, of the Civil Procedure Code requires the parties or their pleaders to produce at

the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. In the present case the books had been filed previously in another Court, and when produced on June 27 they were in fact received and ordered to be placed with the records. There seems to have been no objection to their reception for non-compliance with the provisions of the Code. If the plaintiffs had taken notes of certain entries in the books, as is alleged they had done when the bahis were in the other Court, they could surely have cross-examined the defendants' witnesses, who were called to prove the books, as to the discrepancies. Their Lordships are not satisfied that the books are not the genuine account-books of Ismail Ali Khan. What effect the absence in them of entries in Zohra's name may have in the consideration of the general evidence is another matter.

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In the absence of any statutory provision making compulsory the registration of Mahomedan marriages, the Indian Courts, in case of a dispute as to the factum of a marriage, are usually left to discover, or attempt to discover, the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses. Such has been the burden cast on the Courts in the present instance. The plaintiffs have endeavoured to prove in two ways that Zohra was one of Ismail Ali Khan's wives, namely, first, by direct evidence of an actual marriage, and, secondly, by the acknowledgment by him of her children as his legitimate issue, and by the presumption of marriage arising from such acknowledgment. The defendants, on the other hand, tried to show that Zohra was a woman of loose character, with the object apparently of establishing that it was most unlikely a man in Ismail Ali Khan's position would marry such a person. They also called a number of witnesses, who are said to have been on terms of intimacy with him, to state that they never heard him speak of Zohra as his wife. Including the inference from the account-books, all the evidence on the defendants' side is purely and naturally negative. In their Lordships' opinion the oral testimony regarding the solemnization of a marriage accompanied by ostentatious ceremonies and high dower is by no means satisfactory, and if the case had stood there the absence of Zohra's name in

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Ismail Ali Khan's account-books might have weighed heavily against her. But their Lordships find clear evidence of a reliable character regarding his acknowledgment of her children. Her case, therefore, comes within the rule of Mahomedan law to which Garth C.J. and Wilson J. (afterwards Sir Arthur Wilson) gave expression in *Mahatala Bibee v. Prince Ahmed Haleem-ooz-Zaman*.⁽¹⁾

In their Lordships' opinion the legal presumption arising in favour of Zohra from the acknowledgment of the children is not displaced by the mere inference the defendants seek to draw from the absence of entries in her favour in Ismail Ali Khan's account-books. Such absence is capable of explanation, and it is possible she could have explained it had her attention been called to the matter. One explanation, however, is on the surface : on the facts proved in the case it is quite clear that this lady's father, though belonging to the same clan as Ismail Ali Khan, was a man considerably inferior in social status ; it is not at all unlikely that the deceased was not particularly proud of his connection with the daughter. This would explain both the absence of the entries and his reticence about her to ordinary acquaintances and even friends. On the whole case, their Lordships are of opinion that both Zohra and her children are entitled to their legal shares in the inheritance of Ismail Ali Khan. But the Courts in India have awarded to the plaintiffs, on the basis of the deed of purchase from Zohra, a decree for possession of her share and the shares of defendants 9 and 10. And the question is whether they have acquired any title to the infants' shares under the sale by the mother. The defendants objected in the High Court to the decree of the Subordinate Judge on the ground that she had no power to convey her children's interest to the plaintiffs. The learned judges overruled the objection on the ground that the question did not arise in the present case. Their Lordships regret to have to differ from this view. This is an action in ejectment ; the defendants are in possession ; the plaintiffs, if they are to obtain possession of the minors' shares, must do so on the strength of their own title. It is essential, therefore, to consider whether the title they allege to have acquired under the conveyance by Zohra is well-founded.

The question how far, or under what circumstances according to

(1) 10 Calc. L. R. 293.

Mahomedan law, a mother's dealings with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force; the other declares them wholly void and ineffective. In the former class of cases the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or incumber the minor's property.

In this conflict of opinion their Lordships think it desirable that a definite rule should, if possible, be laid down; and with this object they propose to review briefly the provisions and principles of the Mahomedan law, as they apprehend it, governing the subject.

It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "de facto guardian" that has been applied to these persons is misleading; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Mata Din v. Ahmed Ali* (1) clearly indicated it. There an infant's share was sold by the elder brother in whose charge the child was, along with his own share, to pay a joint ancestral debt. The vendee at the time of the sale was in possession of the whole property under a mortgage executed by the ancestor. On attaining majority the younger brother, ignoring the sale, brought a suit against the vendee-mortgagee for the redemption of his own share. The defence set up was that the sale by the infant's de facto guardian, made for a valid necessity, was binding on the infant. The lower Courts decreed the plaintiff's claim; on appeal to this Board the arguments proceeded on the same lines as in the present case, though in reverse order.

(1) L. R. 39 I. A. 49.

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Lord Robson, in delivering the judgment of the Board, observed as follows: "It is urged on behalf of the appellant that the elder brothers were de facto guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a 'de facto' guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." And he went on to add: "There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Mahomedan law, a sale by a de facto guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

And he then proceeded to state the reasons why that was not considered necessary. This latter passage in Lord Robson's judgment has created the impression that their Lordships' decision was confined to the special facts of that case and left open the general question regarding the validity of alienations by unauthorized guardians of the property of minors.

As already observed, in the absence of the father, under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the judge as the representative of the Sovereign: Baillie's Digest (ed. 1875), p. 689; Hamilton's Hedaya, vol. 4, bk. 52, c. 7, p. 555. No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the de jure guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may "sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealings with

his immovable property are subjected to strict conditions : Baillie's Digest, p. 687. The reason for the restrictions is thus given in the Hedaya, vol. 4, p. 553 : "The ground of this" (the difference in the power of dealing with the two kinds of property) "is that the sale of movable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immovable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed." In fact, the Mussulman law appears to draw a sharp distinction between movable and immovable property (a'kar) in respect of the powers of guardians, as will be seen from the following passage in Baillie's Digest, bk. 10, c. 8, p. 689 : "With regard to the executor of a mother or a brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but a'kar (1) belonging to the estate of the deceased, but can neither sell the a'kar, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father, whether movable or immovable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is movable, but he cannot sell a'kar. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of a'kar coming within his power : and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above."

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When the mother is the father's executrix, or is appointed by the judge as guardian of the minors, she has all the powers of a de jure guardian. Without such derivative authority, if she assumes charge

(1) A'kar is immovable property, and includes houses, groves, orchards, &c. [This and the subsequent footnotes form part of the judgment as delivered.—REPORTER.]

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of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no *de jure* guardian. A fatherless child is designated in the law-books an "infant-orphan" (*yeteem saghir*). The Hedaya classifies the acts that may have to be done for an infant under three heads. It says: "Acts in regard to infant-orphans are of three descriptions, viz.: (1.) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him, a power which belongs solely to the walee, or natural guardian, whom the law has constituted the infant's substitute in those points; (2.) acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling) the *mooltakit* (1), or taker-up, or the mother, provided she be the maintainer of the infant; and as these are empowered with respect to such acts, the walee, or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the guardian, that the infant be in his immediate protection; (3.) acts which are purely advantageous (2) to the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a *mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature" (vol. 4, bk. 44, p. 124).

The examples given under the second head indicate the class of cases in which the acts of an unauthorized person who happens to have charge of a child are held to be binding on the infant's property. They also help to explain and illustrate the extent of such "de facto guardian's" powers. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for

(1) A "*mooltakit*" is a person who undertakes to bring up a foundling or an orphan-child.

(2) In the original the words are "*nafa' mahaz*," which mean "unmixed benefit."

incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. For instance, he may stand in immediate need of aliment, clothing, or nursing; these wants must be supplied forthwith. He may own "slaves" or live-stock; food and fodder must be immediately procured. And these imperative wants may recur from time to time. Under such circumstances power is given to the lawful guardian to incur debts or to raise money on the pledge of the minor's goods and chattels (mata') (1) (Majma'-ul-Anhar, vol. 2, p. 571). And this power, in the absence of a de jure guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorized guardian.

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There is no reference to the pledge or sale of immovable property (a'kar), as the power of dealing with that class of property is confined to the de jure guardians, and is treated in the Fatawai Alamgiri in a separate chapter: Baillie's Mahomedan Law of Sale, c. xvi.

It is to be observed that under the third "description" of acts that may be needful for an infant, a person in charge of a child, although not a de jure guardian, may validly accept on behalf of his ward an unburdened bounty, it being an act "purely advantageous" to the child, to use the expression of the Hedaya.

The reasoning on which it is sought to give to persons who happen to have charge of the person and property of a child, and are, therefore, called "de facto guardians," the same powers as are possessed by de jure guardians is purely inferential. It proceeds on the analogy of a dealing by an outsider who purports to sell another's property without any authority from the real owner. Such a person in the Hanafi law is called a "fazuli," or, as Mr. Hamilton spells it, "fazoollee," which expression is defined by Richardson to mean a person "busying himself in things not belonging to him, or acting without authority." With the effect of the acts of a fazuli their Lordships will deal presently. Before doing so they wish to refer briefly to the state of the decisions in the Indian Courts.

The Calcutta High Court, in sustaining transactions entered into by de facto guardians, has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts,

(1) Mr. Hamilton translates "mata'" as meaning "personal chattels."

J. C. generally speaking, have cut the Gordian knot by holding that all
1918 such dealings with a minor's property were void.

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Their Lordships do not feel called upon to examine in detail either set of decisions. But the last case on the subject in the Madras High Court requires their careful and respectful consideration : *Ayderman Kutti v. Syed Ali*. (1) In their judgment in this case the learned judges have examined the law at considerable length, and their decision appears to divide itself into three broad propositions : first, that as regards the powers of guardians, de jure as well as de facto, the Mahomedan law recognizes no distinction as to the nature or kind of property, namely, whether it is immovable or movable ; secondly, that in substance the powers of an unauthorized person who has charge of an infant are co-extensive with those of a lawfully constituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant ; and, thirdly (and this seems to form the essence of the judgment), that dealings by " a de facto guardian " are neither void nor voidable, but are " suspended " until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it.

With regard to the first of the above propositions, their Lordships have already indicated their views. In their opinion the Mahomedan law, for obvious reasons, makes a distinction, and a sharp distinction, between " goods and chattels " (mata') and immovable property (a'kar) with regard to the powers of dealing by guardians.

The second proposition, speaking with respect, appears to their Lordships to lose sight of the fact that the acts of de jure guardians also are subject to the conditions of necessity for or benefit to the infant. So that, upon the reasoning of the Madras judgment, the powers of " a de facto guardian " would, to all intents and purposes, be co-extensive with those of a de jure guardian. This conclusion would wipe out one of the most important safeguards provided by the Mahomedan law for the protection of the interests of infants. The learned judges say that " The law as regards the effect of dealings with a minor's property by a de facto guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to *salisly* [*sic*], a person professing to deal with another's property, but without having legal

(1) I. L. R. 37 M. 514.

authority to do so, i.e., by a fazuli, as he is technically called ; such sales generally are treated as mauquf, or dependent." Then, after referring to various authorities, they continue as follows : " The result of the above discussion is that, according to Muhammadan jurists, in cases of urgent and imperative necessity, such as those mentioned, the de facto guardian can alienate the property of the minor, no distinction being made between movable and immovable property."

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It would have been an advantage to their Lordships if they had been placed in a position to judge for themselves, on the actual texts, the meaning of the Arabain text-writers and commentators. However, the Hedaya and the Fatawai Alamgiri are recognized as standard authorities in India on the Hanafi branch of the Sunni law. Of the Hedaya there is a rendering in English made by Mr. Hamilton under the orders of Warren Hastings ; and a large part of the Fatawai Alamgiri, paraphrased into English by Mr. Neil Baillie, forms the works commonly known as Baillie's Digest (Hanafi Law). Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but on the whole the English versions of the Hedaya and of the Fatawai Alamgiri are valuable works on Mahomedan law.

The subject of sales by unauthorized persons is treated in the Hedaya in a separate section entitled " of Fazoolee Beea (1), or the sale of the property of another without his consent " (vol. 2, bk. 16, p. 508). It says : " If a person were to sell the property of another without his order the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shafei is of opinion that the contract, in this case, is not complete, because it has not issued from a lawful authority, for that is constituted only by property or permission, neither of which exist in this case." It then proceeds to give the arguments of the Hanafi doctors in support of their view that the unauthorized contract is " complete." And then it adds : " If the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the fazoolee sale, in either case, that is, whether the price have been

(1) Correctly, Bai'.

J. C. stipulated in money or in goods; because the contract rested
1918 entirely on the personal assent of the deceased."

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In other words, the so-called sale remains wholly ineffective until it receives the "confirmation" of the owner, to whom alone belongs the power of "confirming" it. If he dies before he has "confirmed" it, the transaction falls to the ground, as the right to adopt the fazuli's act does not pass to his heirs.

In the *Fatawai Alamgiri* (1) the subject is treated under the designation of "dependent sales" (vol. 3, p. 245; Baillie's *Mahomedan Law of Sale*, pp. 218—219): "When a person sells the property of another, the sale is suspended, according to us [i. e., the Hanafis], for the sanction or ratification of the proprietor; and the existence of both the parties to the contract, and of the subject of sale, is a necessary condition to the validity of his sanction. . . . If the owner should die before sanctioning the sale, sanction by his heir would not suffice to give it operation. Sanction by an owner himself renders a sale operative."

The word in the above passage translated as "suspended" is derived from the same root as the word that has been translated in the heading as "dependant," and in this connection really means "is dependent upon"; also the words "or ratification" have been introduced by Mr. Baillie by way of explanation. The word *ijazat* in the original is rightly rendered into "sanction."

The *Majma'ul-Anhar* states the rule relating to a sale by a fazuli in similar terms; it says in substance that such a sale is "established" (takes effect) on the sanction of the malik (owner), subject to four conditions, which it specifies. And then it adds significantly that according to Shafei (the founder of the second great Sunni school of law) all dealings by an unauthorized person are absolutely void (*batil*) (vol. 2, p. 88).

In their Lordships' opinion the Hanafi doctrine relating to a sale by an unauthorized person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines

(1) The "Book on Sale" in the under the name of the "*Mahomedan Law of Sale*,"
Fatawai Alamgiri has been rendered into English by Mr. Baillie

relating to fazuli sales, so far as they appear in the Hedaya or the Fatawai Alamgiri, to dealings with the property of minors by persons who happen to have charge of the infants and their property—in other words, the “de facto guardians.”

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The Hanafi doctrine about fazuli sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahomedan law as to every other system.

In this connection it should be noted, that whilst chapter 12 deals exclusively with the effect of “dependent sales,” in chapter 16 the rules relating to the powers of guardians are discussed at considerable length: Baillie’s Mahomedan Law of Sale, p. 243; Fatawai Alamgiri, vol. 3, p. 229. The following rule lays down the conditions governing the sales by the executor (i. e., the appointed guardian) of the immovable property of an infant: “And, according to modern decisions, the sale of immovable estate by an executor is lawful only in one of the three cases following: that is, where there is a purchaser willing to give double its value, or the sale is necessary to meet the minor’s emergencies, or there are debts of the deceased, and no other means of paying them”: Baillie’s Mahomedan Law of Sale, p. 247; Fatawai Alamgiri, vol. 3, p. 233.

Having regard to the object in view, this dictum appears to their Lordships to apply to all forms of property which, like a’kar, combine both security and permanency. But it does not exclude the discretion of the judge to sanction any alteration of investment in the interests of the infant.

The following case affords a further illustration of the limitations on the powers of “de facto guardians”: “A woman after the death of her husband sells property that belonged to him, supposing herself to be his executrix, and her husband having left minor children; she after some time declares that she was not the executrix, her assertion, however, is not to be credited as against the purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix, the sale by her is lawful; but if they deny the fact, the sale is void; and though the purchaser should have manured the purchased land, he has no re-

J. C. course for reimbursement against the woman. What has been said
 1918 is on the supposition that the woman sues for a cancellation of the
 IMAMEANDI sale, on the ground that she was not the executrix ; but if the
 v. minor sue on that ground, his claim is to be heard " : Baillie, p. 249 ;
 MUTSADDI. Alamgiri, vol. 3, p. 234.
 ———

The rest of the passage is immaterial for the purposes of this judgment.

The above case shows that even where the mother believes she is vested with authority as her husband's executrix, and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser's position ; but if the transaction is impugned by the rightful owner, namely, the infant, the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act.

A further rule, which is given in the " Book on Pledges " (Mortgages) (Kitab-ur-Rahn) of the Fatawai Alamgiri, which does not appear to have been translated by Mr. Baillie, is equally explicit. After stating the principle applicable to the powers of the father to pledge or mortgage his minor child's property, it goes on to say : " the mother : if she pledges (mortgages) the property of her infant child, it is not lawful, unless she be the executrix [of the father] or be authorized therefor by the guardian of the minor ; or the judge should grant her permission to pledge the infant's property. Then it is lawful ; and the right to possession and user is established in the murtahin (pledgee or mortgagee) without power of sale " : Fatawai Alamgiri, vol. 5, p. 638.

It seems to their Lordships that the power to sell cannot be wider than the power to mortgage.

For the foregoing considerations their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a " de facto guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant ; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf

of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.

Their Lordships are accordingly of opinion that the decree of the High Court, in so far as it awards to the plaintiffs possession of the shares of the defendants 9 and 10, should be discharged, and, subject to this variation, it should be affirmed and the appeal be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, is only likely to confuse the administration of justice.

Solicitors for appellants : *Truefitt & Francis.*

Solicitors for respondents 1 and 2 : *T. L. Wilson & Co.*

J. C.*
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 Feb. 1.

GANGA PERSHAD SINGH APPELLANT;
 AND
 ISHRI PERSHAD SINGH AND OTHERS . . RESPONDENTS.
 ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mortgage—Attestation—Pardanishin Executant—Transfer of Property Act (IV. of 1882), s. 59.

A mortgage deed for over Rs. 100 purported to be signed by a pardanishin lady on behalf of her son, a minor, and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it, but her son came from behind the parda and told them that it had been signed by his mother; they thereupon added their signatures as witnesses:—

Held, that the deed was not “attested” within the meaning of s. 59 of the Transfer of Property Act, 1882, and was consequently invalid.

Shamu Patter v. Abdul Kadir Ravuthan (1912) L. R. 39 I. A. 218 applied.

Padarath v. Ram Nain Upadhia (1915) L. R. 42 I. A. 163 distinguished.

APPEAL from a judgment and decree of the High Court (August 12, 1909) reversing a decree of the Subordinate Judge of Darbhanga.

The sole question argued upon the appeal was whether a mortgage deed dated August 23, 1893, was so attested as to comply with s. 59 of the Transfer of Property Act, 1882.

The circumstances of the attestation and the terms of s. 59 appear from their Lordships’ judgment.

The Subordinate Judge held that the attestation was invalid and the deed inoperative. The High Court reversed that decision and made a decree upon the mortgage.

1918. Feb. 1. *De Gruyther, K.C.*, and *Kenworthy Brown*, for the appellant.

* *Present*: VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

Dunne, K.C., for the respondents.

[Reference was made to *Shamu Patter v. Abdul Kadir Ravuthan*(1), *Padarath v. Ram Nain Upadhia* (2), and *Abdul Karim v. Salimun*. (3)]

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellant and others. The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellant that the mortgage was invalid because it was not executed in the manner rendered necessary by s. 59 of the Transfer of Property Act, 1882. Sect. 59 enacts that "Where the principal money sum secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses." Now the question is, What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Mussummat Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a pardanishin lady, and the account given by the respondents' own witnesses of what happened was this : She was behind the parda when the document was taken to her for signature ; none of the witnesses saw her sign it ; her son came from behind the parda and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of s. 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged," as is the case in some statutes, but "attested" only. At the time this appeal was decided by the High Court this Board had not decided the case of *Shamu Patter v. Abdul Kadir*

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(1) L. R. 39 I. A. 218.

(2) L. R. 42 I. A. 163.

(3) (1899) I. L. R. 27 C. 190.

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Ravuthan.(1) In that case it was held, settling the law as to the interpretation of the words to which their Lordships have referred in s. 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present case, at any rate, much nearer. It was a case of *Padarath v. Ram Nain Upadhya*.(2) The head-note is as follows: "A mortgage deed purported to be executed by two pardanishin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognized their voices."

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognized her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognize the hand which guided the pen, and the voice, sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where not only was the actual execution by a hand put out from behind the curtain not witnessed, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said: "Here is the deed which my mother has executed." That, in their Lordships' opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the

(1) L. R. 39 I. A. 218.

(2) L. R. 42 I. A. 163.

later decision about pardanashin ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below.

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Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellant his costs here and in the Courts below.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Ranken Ford & Chester.*

RAJA OF DEO APPELLANT ; J. C.*

AND

ABDULLAH AND OTHERS RESPONDENTS. 1918
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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Estoppel—Representation—Change of Position—Gift of Immovable Property—Mutation of Names—Support of Grantor—Indian Evidence Act (I. of 1872), s. 115.

Upon the sale of a village by the manager of an encumbered estate it was purchased benami on behalf of the zamindar of the estate, but no transfer to the benamidar was made. After the discontinuance of the management the benamidar, upon the instructions of the zamindar, purported to transfer the village by a deed of sale to the zamindar's illegitimate daughter, who, however, paid no consideration. The zamindar by petition supported an application by the grantee for mutation of names, and she became the registered proprietrix:—

Held, that the zamindar and those claiming under him were estopped from denying the title of the grantee, since as a result of the zamindar's acts her position had been changed in that she had become liable for the revenue assessed upon the village.

APPEAL from a judgment and decree of the High Court (June 10, 1913) reversing a decree of the Subordinate Judge of Gaya.

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

J. C. The suit was instituted by the first respondent against the
 1918 appellant and defendants now joined as respondents, namely,
 RAJA OF Rani Chandra Deo and Rajeshwari. The claim was for a declaration
 DEO of the plaintiff's title to the village of Badam under a deed of sale
 v. dated February 28, 1908, from Rajeshwari, for possession and
 ABDULLAH. other relief.

The facts are fully stated in the judgment of their Lordships.

The Subordinate Judge dismissed the suit. The High Court (Chatterjee and Newbould JJ.) reversed the decision, holding that the appellant was estopped by the conduct of his father, through whom he claimed, from denying the title of Rajeshwari.

1918. Feb. 26, 28. *Dunne, K.C.*, and *T. B. W. Ramsay*, for the appellant. Having regard to the provisions of the Transfer of Property Act, 1884, Rajeshwari, and consequently the first respondent, obtained no title to the village. There being no registered deed of transfer from the late Raja, or the manager, to Kashinath, he was incompetent under s. 54 of that Act to transfer any title. By the terms of that section no title can arise by contract. No question of a gift was raised in the Courts below, the respondents' case being founded on a title in Kashinath and a denial of the late Raja's title. Under s. 123, however, Rajeshwari could not obtain a good title by gift from the Raja in the absence of a registered transfer from him. The authorities are clear that between Hindus a transfer of possession is not sufficient. The policy of ss. 54 and 123 was to nullify every purported transfer not made in accordance with the Act. The first respondent took the conveyance from Rajeshwari without any reasonable inquiries and obtained no title under s. 41.

[VISCOUNT HALDANE. Was not the late Raja estopped from denying the title of Rajeshwari?]

Rajeshwari did not change her position in consequence of any representation by the late Raja, therefore no estoppel arose: Indian Evidence Act (I. of 1872), s. 115. *Sarat Chunder Dey v. Gopal Chunder Laha* (1) was clearly a case of a representation acted on and a consequent change of position. Rajeshwari paid no consideration, and advanced no money on the faith of the

representation, if there was one. If assuming liability for the revenue is a sufficient change of position, every donee of immovable property acquires a title by estoppel notwithstanding the provisions of the Transfer of Property Act.

Further, the evidence established that Rajeshwari was a minor at the date of the transfer to the first respondent; he therefore took no title : Transfer of Property Act, 1884, s. 7 ; Indian Contract Act, 1872, s. 11.

Sir William Garth, for the first respondent, was not called upon.

March 18. The judgment of their Lordships was delivered by

LORD DUNEDIN. In this suit Syed Abdullah sues the Raja of Deo for possession of a village called Badam. The plaintiff is purchaser from a dancing girl, Rajeshwari Koer, who is the natural daughter of the late Raja Bhikham of Deo, father of the present Raja, defendant.

The history of the matter is this : Raja Bhikham having got into involved circumstances, his estate was put under management under the provisions of the Chota Nagpur Encumbered Estates Act, which had been made to apply to Deo by a special Act. The manager appointed under the Act one Bhuan Lal, who had, in terms of the Act powers of sale, put up to public auction the village of Badam. It was bought by Kashinath Singh for the sum of Rs. 2000. As a matter of fact, Kashinath had been put forward by the Raja himself, who provided him with the money. No conveyance was executed by Bhuan Lal in favour of Kashinath. The management came to an end in 1896 and the Raja was restored to his estate. In 1897 the Raja, who had expressed his desire to benefit Munni Bibi, the mother of Rajeshwari, and his infant daughter by her, caused Lajjadhari, the adopted son of Kashinath, who had by this time died, to execute a conveyance of Badam in favour of Rajeshwari. The deed of conveyance bore to be in respect of a consideration of Rs. 5000, but in reality no money passed—Lajjadhari merely acted on the command of the Raja. On April 22, 1898, Rajeshwari, being a minor, applied through her mother as guardian for registration and mutation of names in respect of the village of Badam. On the same day the Raja presented a petition in which he narrated the fact of Badam having

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J. C. been sold by Bhuan Lal, the manager, set forth that Kashinath
1918 had died without having obtained a conveyance and that Lajjadhari
— his son had sold the property to Rajeshwari, and prayed that
RAJA OF Rajeshwari's petition should be granted and her name inserted
DEO in the register, "to which your petitioner has no objection what-
v. ever." Rajeshwari's name was accordingly entered in the Govern-
ABDULLAH. ment register as proprietrix of the village of Badam.

In October, 1898, Raja Bhikham died, and the present Raja being a minor the estate came under the management of the Court of Wards. Some time in 1899 Mr. Wright, the manager, turned out Rajeshwari, who was in possession, *via facti* and without process. In 1901 Mr. Wright conveyed Badam to Rani Chandra Koer, the surviving widow of Raja Bhikham, on the idea that it was *gar* property descending from Rani to Rani. In 1902 the Rani applied for mutation of names. Her application was opposed by Rajeshwari and was refused. In 1904 the Rani raised a civil suit for a declaration that the property was hers. To this suit she called as defendants Rajeshwari and the young Raja, the present defendant. The whole facts were gone into. The Rani had based her case on an allegation that Kashinath was a benamidar for her. The Subordinate Judge held that Kashinath was the benamidar of Raja Bhikham, and not of the Rani, and dismissed the suit, adding an opinion that Raja Bhikham himself would have been estopped from denying that the property belonged to Rajeshwari. On appeal the District Court affirmed the judgment, but did not repeat the dictum as to estoppel. In 1908 Rajeshwari executed a conveyance in favour of the present plaintiff, who in the same year raised the present suit.

The defence to the suit was, after discounting irrelevant pleas, based on two grounds—first, a denial of Rajeshwari's title to convey anything to the plaintiff; second, a denial that Rajeshwari had conveyed to the plaintiff on the allegation that she was a minor at the time of the conveyance. The learned Subordinate Judge upheld both defences and dismissed the suit. The Appeal Court reversed and gave judgment in favour of the plaintiff.

It will be convenient to dispose of the second ground of defence first, as it depends on a pure question of fact. The Subordinate Judge, while commenting on the unreliability of the witnesses,

three in number, adduced by the defendant to prove the minority, gave judgment on the ground that the rebutting evidence was not what it might have been. The High Court, agreeing with the criticism on the defendant's witnesses, came to the conclusion that the defendant had not made out his allegation. Their Lordships agree with the High Court. The onus to prove minority is on the defendant who asserts it. He brings no reliable evidence to prove this assertion. This defect in his proof cannot, their Lordships think, be cured by a mere criticism of the evidence brought by the plaintiff. It would further seem to their Lordships that the evidence tendered by the brother is not open to any obvious objection. But it is enough to say that, the matter being left in doubt, the defendant falls to prove his assertion.

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The sole question, then, is whether there was a title in Rajeshwari. Formal title by progress there was not. Both Courts find that the sale by auction, though it gave a right to the purchaser to get a title, did not give him an actual title. Admittedly Kashinath never got the actual title, to which as purchaser he was entitled. The plaintiff in the Court below attempted to prove that Kashinath was a true purchaser for value. In this he failed, and both Courts are agreed as to this. He was only trustee for the Raja Bhikham. The argument in the lower Court then turned mostly on the effect of the judgments of 1905 and 1906 in the suit by the Rani. The plaintiff urged that as between Raja Bhikham and the defendant, who were both co-defendants to the Rani's suit, these judgments formed a *res judicata* to the effect that the property belonged to Rajeshwari. In deciding—rightly—that this was not so, the learned Subordinate Judge overlooked the fact that, though the dictum of the Subordinate Judge in the Rani's suit that Raja Bhikham was in a question with Rajeshwari estopped from denying that the property was hers was an obiter dictum, yet on the emergence of the same facts as were found in that suit the question arose to be decided in this suit, it being obvious that if Raja Bhikham was estopped the present Raja, his son, taking by gratuitous title from him, was equally estopped. But the High Court took up that point and decided it in favour of the plaintiff. The question before their Lordships is whether that view was right.

Their Lordships think that it was. In the first place, they are

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satisfied that the facts are as have been stated above. When, therefore, Lajjadhari executed the conveyance in favour of Rajeshwari at the instance of Raja Bhikham, he (Raja Bhikham) was the true owner. Kashinath was a trustee for Raja Bhikham, and Lajjadhari could only succeed to his father's trusteeship. Further, Raja Bhikham was the proprietor of the estate of which Badam was a part. So that if by renunciation or limitation the right of Kashinath to get a conveyance became extinct, the full right as well as the title was in him. In this position of affairs not only did Raja Bhikham cause Lajjadhari to execute the conveyance, but when Rajeshwari proceeded to give effect to that conveyance, by applying for registration he actively assisted her. By so doing he caused her to change her position, for by registration she became bound for all the State liabilities which attach to the registered holders of immovable property. If then Raja Bhikham had lived and attempted to regain the property these actings of his would, in their Lordships' view, have estopped him from making the claim. He did not do so. The present defendant is his son and succeeded by gratuitous title, and he therefore cannot do what his father would have been unable to do.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for first respondent : *E. Dalgado.*

RAJA OF PACHETE APPELLANT ;
AND

KUMUD NATH CHATTERJI AND OTHERS . RESPONDENTS.

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March 21.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Chota Nagpur Encumbered Estates Act—Land outside Chota Nagpur—Mortgage—Power of Manager—Money paid under Pressure of Legal Proceedings—Voluntary Payment—Bengal Regulation VIII. of 1819.

The Chota Nagpur Encumbered Estates Act (VI. of 1876) does not apply to immovable property outside Chota Nagpur; a manager appointed under that Act has no power to reduce the rate of interest provided by a mortgage of land not situated within Chota Nagpur.

Bhicha Ram Sahu v. Bishambhar Nath Sahi (1912) 16 Cal. L. J. 527 approved. . .

Having regard to the nature of the procedure provided by s. 14 of the Patni Regulation (Bengal Regulation VIII. of 1819), a payment of rent by a patnidar to his zamindar upon receipt of notice under that section that the tenure would be sold to realize the rent due does not fall within the rule that money paid under pressure of legal proceedings is irrecoverable.

APPEAL from a judgment and decree of the High Court (July 23, 1914) affirming a decree of the Subordinate Judge of Burdwan.

The suit was instituted by the respondents against the appellant to recover money which they had paid in respect of patni rents upon notice of summary proceedings under s. 14 of the Patni Regulation (Bengal Regulation VIII. of 1819) and under circumstances which are stated in the judgment of their Lordships.

The Subordinate Judge made a decree for the amount claimed and that decision was affirmed by the High Court (Fletcher and Richardson JJ.).

1918. March 1, 4, 5. *Upjohn, K.C., De Gruyther, K.C., and Parikh*, for the appellant. Even if the reduction of the mortgage interest was ultra vires the manager under the Chota Nagpur Encumbered Estates Act, the respondents are not entitled to recover. Money paid under pressure of legal proceedings is not

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recoverable : *Marriot v. Hampden* (1) ; *Moore v. Vestry of Fulham*. (2) Under s. 14 of Bengal Regulation VIII. of 1819 the respondents, had they chosen, could have deposited the amount claimed and had an adjudication, or they could have brought a suit for a reversal of the sale and for damages. Having elected to pay, they cannot recover the money. Apart from that principle the respondents had no ground for recovery ; there was no evidence of a mistake of fact, nor that the claim was made by legal coercion. *Seth Kanhaya Lal v. National Bank of India* (3) is distinguishable, as in that case there was a trespass ; here there was a genuine claim for the adjudication of the Court. Further, the manager under the Chota Nagpur Encumbered Estates Act had power to modify the terms of the mortgage. Provided there is an encumbered estate within Chota Nagpur the manager can deal with all the mortgaged property of the holder in whatever part of British India it may be situated. This appears from a consideration of the provisions of the Act, especially s. 3, and of the purpose for which the Act was passed. The decision to the contrary in *Bhicha Ram Sahu v. Bhishambhar Nath Sahai* (4) is erroneous. In any event, so far as the claim was for money paid in respect of the property in Bankara there was no cause of action in the Burdwan district in which the suit was instituted : Code of Civil Procedure (V. of 1908), s. 20.

Dunne, K. C., and *T. B. W. Ramsay*, for the respondents, were not called upon.

March 21. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a decree of the High Court at Fort William in Bengal affirming a decree of the Subordinate Judge of Burdwan. The respondents as plaintiffs brought a suit to recover Rs. 6848.8, being the amount of patni rents for the years 1902-1910, paid by them, as they alleged, although not due, in order to save their lands from sale under the powers conferred on zamindars by s. 14 of Regulation VIII. of 1819.

The appellant, on whose behalf as having rights conferred on

(1) (1797) 2 Sm. L. C., 12th ed.
303.

(2) [1895] 1 Q. B. 399.

(3) (1913) L. R. 40 I. A. 56.

(4) 16 Cal. L. J. 527.

a zamindar it had been proposed to put the power of sale in force, contended, in the first place, that the money could not now be recovered, on the ground that, even if not legally due, it was paid voluntarily, or if otherwise than voluntarily, as the result of proceedings in which the respondents had not chosen to defend themselves, and which consequently could not be reviewed. In the second place, he contended that the amount paid was due under the provisions of the Chota Nagpur Encumbered Estates Act (VI. of 1876).

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The facts do not appear to be obscure, and if the appellant's contentions are right on either of the points stated he may be entitled to succeed. As, however, their Lordships are of opinion that the argument addressed to them from the Bar fails on both points, they have not found it necessary to call on the respondents to support the judgments in the Courts below, either on the two questions referred to or on certain minor points which their Lordships did not consider to be tenable.

The appellant is Raja of Pachete in Chota Nagpur. He succeeded to the title and estates on the death of his grandfather, the late Maharajah Nilmoni Singh Deo. The late Maharajah in 1887 borrowed from one Mahesh Chandra Chatterji, a resident of Madanapur in Burdwan, Rs. 22,435, giving the latter security in the form of a usufructuary mortgage of lands constituting four lots—three in the district of Bankara and one in the district of Burdwan. Of these four lots the Maharajah had previously granted patni leases to Mahesh Chandra Chatterji. The respondents are the successors in title of the latter in respect both of the leases and of the mortgage security. All of the four lots, the subjects of the leases and the mortgages, lie outside the boundaries of Chota Nagpur.

The mortgage was effected by a sudbandhaki mortgage bond under which it was stipulated that interest at the rate of 14 annas per Rs. 100, equivalent to $10\frac{1}{2}$ per cent. per annum, should be payable, and that this interest, which was substantially equivalent to the amount of the annual rents payable under the patni leases, should be set off as against the interest until repayment of the principal sum due under the mortgage.

In 1895, the affairs of the late Maharajah having become

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embarrassed, the provisions of the Chota Nagpur Encumbered Estates Act were applied to his case. The language and scope of this Act their Lordships will refer to later. For the present it is sufficient to state that the management of the Maharajah's estate was vested in a manager appointed under s. 2 of the Act, and that a vesting order appears to have been published in the *Calcutta Gazette* in terms wide enough to apply, if the Act enabled it to do so, to all his immovable property both within and outside the boundaries of Chota Nagpur. In response to a notice issued by the manager, the respondents, among other creditors, put in a claim. They submitted their mortgage bond with a petition praying for a settlement. The manager dealt with the claim under s. 8 of the Act, and purported to settle the amount of principal due, and, what was in the circumstances still more important, to reduce the future interest to 6 per cent. per annum. He also determined that in every half-year the difference between the interest as thus reduced and the amount of the patni rents should be applied in satisfaction of the principal. The Commissioner, on whom jurisdiction to do so was claimed to have been entrusted by the Act, sanctioned the arrangement.

In 1907 the debts due by the estate were considered to have been provided for, and the possession and management were made over to the appellant, who had succeeded to the title. Thereafter he collected from the respondents the amounts of surplus patni rents in question in the suit, on each occasion applying to the Collector of the district where the lots were situated for authority to put in force the summary provisions for sale for recovery of patni rents enacted by the Regulation of 1819 hereinafter referred to. The respondents, on receiving the successive notices to this effect authorized by the Collector, paid the amounts for the recovery of which they have brought the present suit. They appear to have made no formal protest, but the learned Subordinate Judge who tried the case has found that the circumstances were such that they cannot be taken to have made the payments gratuitously, a conclusion of fact from which the High Court did not dissent on appeal, and from which their Lordships do not dissent.

It is important to see what were the terms of s. 14 of Regulation VIII. of 1819, under which these payments were insisted on.

Sect. 8 had enacted that zamindars in the position of the present appellant should be entitled in certain cases to apply for sales of patni tenures for arrears of rent. Sect. 14 defines in its first branch the procedure in case the taluqdar objects. He may stop the sale by lodging the amount demanded ; he may also bring a suit and obtain a reversal of the sale and damages. By its second branch the section provides that if the taluqdar desires to contest the zamindar's demand he may apply for a summary investigation. If this takes place, and an award results in time, the effect of the award is to prevail. But if the proceedings be still pending, the sale is none the less to take place unless the amount claimed be deposited, and if such deposit is not made the taluqdar is to have no remedy excepting by a regular action for damages and reversal of the sale. Under an amendment of the Regulation passed on 1832 the conduct of the proceedings in regard to such sales is given to the Collector, Deputy Collector, or Head Assistant.

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Their Lordships are of opinion that the procedure provided for by s. 14 is such as not to put those submitting to pay money under it in the position in which they would have found themselves had they paid a claim brought against them in an ordinary suit in which they could have set up a full defence but had failed to do so. In such a case those who pay lose their right to resist however good, because, having had the full opportunity of doing so which the law allows them once for all, they have not availed themselves of the opportunity so given. But s. 14 expressly recognizes the right to bring a separate suit in an ordinary Court, the proceedings before the Collector notwithstanding. If the purchaser at the sale impeached is made a party, the sale may even be set aside. All the taluqdar gets by demanding a summary investigation before the Collector is an award the application for which will not stop the sale. The only step by which the sale can be stopped is by a deposit of the full amount claimed, and when this is done the question of title remains capable of being raised in an ordinary suit. Their Lordships are accordingly of opinion that the rule which prevents a person from recovering back money which he has paid on a claim in legal proceedings to which he might have set up a defence but has failed to do so has no application here. This conclusion is, under the circumstances already referred to, fatal

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to the first branch of the case presented by the appellant. On the argument addressed to them on this part of the case they have only to add the observation that the proceedings before the Collector are of an administrative rather than a properly judicial character. The zamindar who has a power of compelling a sale is to exercise this power through the instrumentality of the Collector himself, who acts, not magisterially, but ministerially, and who has, in the true view of his functions, no capacity to give effect to any inquiry he may make into title comparable to the capacity possessed by an ordinary judicial tribunal.

Their Lordships now turn to the second argument by which the learned counsel for the appellant supported the case made. This argument turned on the question whether the powers conferred by the Chota Nagpur Encumbered Estates Act extend to land outside the limits of Chota Nagpur. The language of the Act is obscure, and their Lordships have found it necessary to look at the whole of its provisions somewhat closely in order to arrive at a conclusion on the point. The preamble is material, for it defines the purpose of the measure as the provision of "relief of holders of land in Chota Nagpur who may be in debt, and whose immovable property may be subject to mortgages, charges, and liens." Prima facie the immovable property would therefore mean such property in Chota Nagpur, and this is borne out by the title of the Act, which is "the Chota Nagpur Encumbered Estates Act." Sect. 2 enacts that where "any holder of immovable property" (which plainly means here immovable property in Chota Nagpur, and there only) applies to the Commissioner stating that the holder of the "said property" is subject to, or that "his said property" is subject to, debts or liabilities, the Commissioner may, with the consent of the Lieutenant-Governor of Bengal by Order published in the *Calcutta Gazette*, appoint an officer called a manager, and vest in him the management of the whole or any portion of the immovable property of the holder. The application must state the particulars of the debts or liabilities to which the holder is subject, or with which his immovable property is charged, and also the particulars of the immovable property to which he is entitled. Sect. 3 provides that on the publication of the Order "all proceedings which may then be pending in any civil Court in British India in respect to

such debts or liabilities shall be barred, and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void." Among other things, the section further provides that the holder and his heir shall be incompetent to mortgage, charge, lease, or alienate their immovable property, or to grant receipts for rents or profits, and shall be incompetent to enter into any contract which may involve them in pecuniary liability. Sect. 4 confers on the manager during his management "of the said immovable property" large powers of management and of settling debts. Sect. 5 provides that, on the publication of the Order vesting the management in him, the manager is to publish a notice in English, Urdu, and Hindi (not, their Lordships observe, in the remaining languages vernacular in other parts of India) calling for the presentation of claims, and all claims not duly presented are to be barred. Sect. 8 enables the manager to determine the amounts of principal justly due to the creditors of the holders of the property and to the mortgagees on it. By sect. 9 the manager may inquire into the consideration given for leases and, if it appears insufficient, cancel them. Sect. 10 gives an appeal against proceedings of the Collector to the "Deputy Commissioner within whose jurisdiction the property is situate," if not himself the manager. Sects. 17 and 18 confer on the manager power to lease and to mortgage and sell (in the latter cases with the assent of the Commissioner). Sect. 19 enables the Lieutenant-Governor of Bengal (within which Chota Nagpur is situate) to make rules for the administration of the Act. Sect. 23 saves the jurisdiction of the Courts in Chota Nagpur in certain kinds of suits relating to immovable property brought under the operation of the Act.

Their Lordships have not had before them the Order published in the *Calcutta Gazette*, by which the Commissioner appointed the manager in the present case, and vested in him the management of some or all of the immovable property of the late Maharajah; but however wide the terms of this Order may have been, the scope of its operation depended on the scope of the Act itself. After considering the Act as a whole, their Lordships have arrived at the conclusion that the primary intention to be collected from its language is that of providing, by a measure of local application,

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for the relief of the burdens affecting the land within Chota Nagpur owned by a class of landholders there. The governing purpose related to a particular locality. It is not a statute analogous to a Bankruptcy Act, the controlling purpose of which is provision for creditors in a liquidation. To this end s. 16 confers the jurisdiction requisite to enable the manager to recover immovable property in the possession of a mortgagee or vendee in the Court of the Deputy Commissioner within whose jurisdiction the property is situate. But in Regulation districts where there is no Deputy Commissioner these words would be inapt, and the inference is that they were intended to apply only to immovable property in Chota Nagpur, where a Deputy Commissioner has jurisdiction. This conclusion is borne out by s. 23, which saves, as already observed, the jurisdiction of the Courts of Chota Nagpur over certain questions, and not the corresponding jurisdictions of Courts outside it.

Their Lordships agree with the views of the scope of the Act expressed by the learned judges who decided the case of *Bhicha Ram Sahu v. Bishambhar Nath Sahi*. (1) They think that the Act has no application to immovable property outside Chota Nagpur. The main purpose is, as they have already observed, the protection of zamindars within that district, and any provisions which affect rights to enforce in jurisdictions outside it personal debts or liabilities are merely ancillary to the main purpose of the Act, which is directed to improving the position of persons owning land within it. If this be so, no claims in rem of land outside it ought to be construed as affected by the merely general and ambiguous expressions which the Act contains.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, with costs.

Solicitor for appellant : *E. Dalgado*.

Solicitors for respondents : *T. L. Wilson & Co.*

(1) 16 Cal. L. J. 527.

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ON APPEAL FROM THE BOARD OF REVENUE FOR THE UNITED PROVINCES OF AGRA AND OUDH.		

Oudh Rent Act (XXII. of 1886), Ch. VII.A —Thikadar—Enhancement of Rent.

A favourable rent payable by a thikadar, or person to whom the collection of rent has been leased, is liable to be enhanced under Ch. VII.A added to the Oudh Rent Act (XXII. of 1886) by U. P. Act IV. of 1901, in the circumstances and subject to the conditions therein provided.

APPEAL from a decree of the Board of Revenue (April 2, 1915) reversing a decree of the Commissioner of Lucknow and restoring a decree of the Deputy-Commissioner of Sitapur.

The question in the appeal was whether the rent payable by the appellant under a lease dated February 23, 1891, was liable to enhancement in a Court of Revenue under Ch. VII.A of the Oudh Rent Act (XXII. of 1886).

The facts and the material statutory provisions appears from the judgment of their Lordships.

1918. March 7. *De Gruyther, K.C.*, and *Amiend Jackson*, for the appellant. There was no power under the Oudh Rent Act, 1886, to enhance the rent payable by the appellant. It is the essence of Ch. VII.A added to the Act by the U. P. Act IV. of 1901 that it applies only to grants of land. The document of February 23, 1891, was not a grant ; it gave no immediate right of occupation to the appellant. The appellant was a thikadar, and by virtue of s. 3, sub-s. 10, was not a tenant for the purposes of Ch. VII.A. That chapter does not apply to thikadars.

Sir Erle Richards, K.C., and *O'Gorman*, for the respondents. Under the terms of ss. 107A and 107B the right to obtain an

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enhancement of rent exists as to all land in Oudh held at a favourable rent, subject to certain exceptions not applicable in this case. The interest of the appellant under the lease was "land" within the meaning of the Act. The appellant is not strictly a thikadar, but in any case thikadars are not excluded from the operation of Ch. VII.A. Sect. 3, sub-s. 10, of the Act of 1886 does not affect the rights of the proprietor under Ch. VII.A. No hardship is caused by the liability to enhancement. Under s. 52 of Act XVII. of 1876 there was a liability to resumption; the Act of 1901 took away that liability in certain cases, and substituted for it the liability to enhancement of the rent.

De Gruyther, K.C., in reply. If for the purpose of the Act the appellant is to be treated as a tenant, she cannot recover under the tikait. Ch. VII.A does not apply to the circumstances of this case, possibly by an oversight.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated April 2, 1915, of the Board of Revenue for the United Provinces of Agra and Oudh, which set aside a decree, dated October 7, 1914, of the Court of the Commissioner of Lucknow, and restored a decree or order, dated June 4, 1914, of the Court of the Deputy-Commissioner of Sitapur.

The suit in which this appeal has been brought was instituted in a Court of Revenue, which alone had jurisdiction to entertain the suit, a civil Court having no jurisdiction in the matter. In the suit the plaintiffs claimed a decree for the possession of the entire village mauza Bandhia Kalan, situate in pargana Nighasan, in the district of Kheri, by resumption of the Muafi, and in the alternative that the rent might be fixed at a proper amount under s. 107G of Act XXII. of 1886 (the Oudh Rent Act, 1886), and other reliefs which need not be referred to. The Deputy-Commissioner of Sitapur, before whom the suit came for trial, did not grant a decree for resumption, but having found that the rent was liable to be enhanced under s. 107G of Act XXII. of 1886, by his decree declared that the defendant was a tenant of the mauza without any right of occupancy, and determined the rent to be payable at Rs. 2000 per annum. The only question to be considered in this appeal is whether the rent at

which the mauza was held by the defendant of the plaintiffs at the date of suit was or was not liable to be enhanced, and that question depends upon the nature of the lease under which the mauza was held by the defendant.

Mauza Bandhia Kalan is part of the taluqdari estate of Majhgain. On November 13, 1882, Raji Milap Singh, in whom was then vested that estate, by his will devised mauza Bandhia Kalan to his wife Rani Dhan Kunwar, who on his death obtained possession of the mauza. Thereafter Rani Dhan Kunwar, in order to provide maintenance for her daughter, who is the defendant in this suit and the appellant in this appeal, and maintenance for that daughter's son, executed on February 23, 1891, the following lease: "Lease in favour of Chhoti Betia, i. e., Parbati, who is married at Malanpur, and also in favour of the grandson, i. e., the dear son of the said daughter, granted by Rani Dhan Kunwar, talukdar of Majhgain and Bhur, pargana Nighasan. Mauza Bandhia Kalan, pargana and tahsil Nighasan (hadbast No. 61) owned and possessed by me, the executant, the revenue of which, along with that of the entire taluka, is paid to Government, is leased to you from 1297 Fasli up to the term of your life and that of your dear son, at a jama of Rs. 584 per annum. You should take possession of the said mauza from 1297 Fasli as a lessee for life and bring into your own use all sorts of receipts which include mal and siwai and pay to me Rs. 584 annual lease money, instalment by instalment, year by year, without objection, and all sorts of profits will belong to you and your dear son during your respective lives and after you and your dear son the lease of the mauza will end and it will, as before, revert to the possession of the holder of the ilaka. During your life and that of your dear son neither I nor any heir or representative of mine will have power to set aside the lease. If you do not pay the jama reserved by the lease at the proper time, it will be duly recovered from you without interest by means of a suit in Court. You should, during the period of your lease, fully carry out all orders issued by the authorities in respect of the village, so that no stigma of disobedience of orders might attach to you or to the taluka. You should keep the tenantry satisfied in every way, so that the population of the village might increase and the village might not become desolate. Under proper circumstances you are also authorized to eject the

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tenants, so that you might eject them after issuing notice of ejectment. You should, however, see that they are not oppressed. You are authorized to enhance or reduce the rent of the tenants so far as it is just. You should carry on all the affairs of the village just as they have been hitherto conducted. These few presents have, therefore, been executed by way of a lease to stand as evidence." [The boundaries of the land were then stated.]

Under that lease the defendant became the thikadar or person to whom the collection of rents in the mauza had been leased by Rani Dhan Kunwar, who was then the landlord. Rani Dhan Kunwar died in 1891. After her death the taluqa vested in Raghubar Singh, a plaintiff and one of the respondents, and in Raj Mangal Singh, represented in this suit and appeal by the Deputy-Commissioner of Kheri as the special manager of the Court of Wards of the estate of Majhgain.

Land forming a mahal or part of a mahal which is under Ch. VII.A of Act XXII. of 1886 liable to be resumed by the proprietor or to have the rent payable in respect of it enhanced must be land held rent free or at a favourable rate of rent. By s. 1071 of the Act it is enacted that "For the purposes of this Chapter" (Ch. VII.A) "a grant of land at a favourable rate of rent means a grant of land at a rent less than the aggregate of the revenue and local rates payable thereon."

All three Courts in India have found that the rent of Rs. 584, which was made payable by the lease of February 23, 1891, was a favourable rate of rent within the meaning of Ch. VII.A. But it has been contended on behalf of the appellant that Ch. VII.A does not apply to persons holding land as thikadars. That contention is based on s. 3, sub-s. 10, of the Act, according to which a "tenant means any person, not being an under-proprietor, who is liable to pay rent; and in the following portions of this Act, namely, sections 13, 14, 15, 17, 18, 29, 53, 54, 55, sub-sections (1.) and (2.), 56, 59, 60, 61, 62, 108, 126, and 138, but in no others, the expression 'tenant' shall be held to include a thikadar or person to whom the collection of rents in a village, or portion of a village has been leased by the landlord."

Sect. 3, sub-s. 10, which contains that definition, was part of Act XXII. of 1886 as it was passed in 1886. Ch. VII.A, which

deals with the resumption and the enhancement of the rent of land held rent free or at a favourable rate of rent and contains s. 107A to s. 107K, was added to Act XXII. of 1886 in 1901 by an amending Act, U. P. Act IV. of 1901, and consequently the specific enactments of Ch. VII.A are not limited in their application by s. 3, sub-s. 10, which must be regarded as a mere glossary defining the terms "tenant" and "thikadar" as those terms are employed in the Act XXII. of 1886 as it stood in 1886 when it was passed.

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The object of enacting Ch. VII.A which the Government of India had in view obviously was the protection of the Government revenue assessed upon agricultural lands, and as far as possible to maintain proprietors of lands in a position to enable them to pay the Government revenue and the local rates assessed upon their lands and thus to avoid losing their lands by making default in payment of the revenue due to the State. In some parts of India, in Oudh for instance, many proprietors of lands were in the habit of acting improvidently in making grants of lands, by lease or otherwise, rent free or at rents which did not enable them to pay the public revenue and local rates assessed upon their lands. As early as 1793 the Governor-General in Council passed Regulation XIX. of 1793, with a similar object of protecting the Government revenue derivable from lands. In s. 1 of that regulation it is stated: "By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind, according to local custom) unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zamindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." That regulation was applied to Oudh after the annexation of that province.

By s. 52 of Act XVII. of 1876 (the Oudh Land Revenue Act,

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1876), it was enacted: "All grants (whether in writing or otherwise) by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent or at a favourable rate of rent, are hereby declared to be liable to resumption, unless such grants have been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner. Provided that, if such grants are held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, they shall be held valid against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate which was current at the date of the grant."

Sect. 52 was subject to the procedure and exemptions contained in ss. 53, 54, and 55 of that Act.

Sect. 52 of Act XVII. of 1876 was wide enough to apply to grants to thikadars of land in Oudh exempt from the payment of rent or held at a favourable rate of rent, and it authorized the resumption of such grants when they had not been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner of Oudh. Sects. 52, 53, 54 and 55 of Act XVII. of 1876 continued in force until Act IV. of 1901 was passed. By s. 107E, which by Act IV. of 1901 was added to Act XXII. of 1886, it was enacted as follows: "Land held rent free or at a favourable rate shall be liable to resumption, only when by the terms of the grant or by local custom it is held—(a) At the pleasure of the grantor; (b) For the performance of specific service, religious or secular, which the proprietor no longer requires; (c) Conditionally or for a term, and the conditions are broken or the term expires" That section limited the lands which might otherwise have been resumed if s. 52 of Act XVII. of 1876 had remained in force, and in that respect was more favourable to the grantees of such lands than s. 52 of Act XVII. of 1876 had been.

By s. 107A, which was one of the sections which were added to Act XXII. of 1886, the proprietor of a mahal or part of a mahal was, amongst other rights of suit, given a right to sue to enhance the rent of any land held at a favourable rate of rent, whether so held by grant in writing or otherwise. And by s. 107B all land in Oudh held at a favourable rate of rent was made liable to enhancement

of rent unless the holder establishes certain specified facts, which have not been established in this case. That section is subject to the following proviso: "Provided that no land held under a written instrument, whether executed before or after the 1st day of January, 1902, by which the grantor expressly agrees that the grant shall not be resumed, shall be liable to resumption or assessment or enhancement of rent until the grantor dies, or the term of the current settlement of the local area in which the grant is situated expires, whichever event first occurs." In the present case not only did the grantor of the lease die before suit, but the term of the settlement current at the date of the lease of the local area in which mauza Bandhia Kalan is situate expired before the suit was brought.

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By s. 107G, which is one of the sections which in 1901 were added to Act XXII of 1886, it is enacted as follows: "Land not liable to resumption under section 107E and to which the provisions of section 107H do not apply shall be liable to assessment or enhancement of rent as the case may be. (2.) When a grant held rent free or at a favourable rate is found to be liable to have rent assessed or enhanced thereon, the grantee shall be deemed to be a tenant without a right of occupancy under sections 36 and 37 of this Act, and the rent shall be determined at such rate as the Court may consider fair and equitable, having regard to the rents paid for land of similar quality and with similar advantages in the neighbourhood. (3.) The period of seven years for which he (the grantee) shall be entitled to retain the holding shall begin from the first day of July next following the date of the institution of the suit."

Mauza Bandhia Kalan was not liable to resumption under s. 107E, as the term for which the lease was granted has not expired, and it is not proved that any condition contained in the lease has been broken. The provisions of s. 107H do not apply in this case, and consequently s. 107G does apply, as the lease of February 23, 1891, was a grant of land at a favourable rate of rent, and mauza Bandhia Kalan was land held by the defendant at a favourable rate of rent within the meaning of Ch. VII.A of Act XXII. of 1886. The decree of the Board of Revenue which set aside the decree of the Commissioner of Lucknow and restored the decree or order of the Deputy-Commissioner of Sitapur enhancing the rent to Rs. 2000 per annum was right.

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Their Lordships will humbly advise His Majesty that the decree of the Board of Revenue should be affirmed, and that this appeal should be dismissed with costs.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *The Solicitor, India Office.*

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March 15.

KANHAI LAL APPELLANT ;

AND

BRIJ LAL AND ANOTHER RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Reversioner—Claim to succeed—Antecedent Family Dispute—Compromise—Taking Benefit of Compromise—Reversionary Claim barred.

Upon the death of a Hindu governed by the Mitakshara his nephew (the appellant) and other members of the family disputed the widow's right to succeed to the property left by the deceased. The appellant was a party to a compromise made in 1892 by which the property was immediately divided. He did not take a share under the compromise, but he was thereby recognized as the adopted son of another deceased uncle, and in 1898 obtained by relinquishment possession of the share of the property allotted thereby to that uncle's widow. In 1912 the widow of the original holder died, and the appellant and his brother claimed the entire property as reversioners:—

Held, that the appellant having entered into and taken the benefit of the compromise was precluded from claiming as reversioner.

CONSOLIDATED APPEALS from a judgment and two decrees of the High Court (June 15, 1915) affirming and reversing respectively decrees of the Court of the Subordinate Judge of Shahjahanpur.

The two suits out of which the consolidated appeals arose were instituted by the appellant and his brother under circumstances

* *Present*: VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

which fully appear from the judgment of their Lordships. The plaintiffs by their plaints claimed that upon the death of Ram Dei in 1912 they were entitled, under the Mitakshara law, to inherit the entire estate left by her husband, Bahadur Lal, who died in 1883.

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The sole question arising upon the appeals was whether the appellant's claim was precluded by a compromise of a family dispute in 1892 and the appellant's acts thereunder.

The High Court, affirming the decree of the trial judge in one suit and reversing the decree of a different trial judge in the other suit, held that the appellant was so precluded.

1918. Feb. 19, 21. *De Gruyther, K.C.*, and *Dube*, for the appellant. The compromise did not affect the appellant's right to claim as reversioner. He was not competent in Hindu law to deal in any way with his right in expectancy : *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (1); *Amrit Narayan Singh v. Gaya Singh*. (2) Further, the claim which the appellant compromised in 1892 was merely the claim which he was then making to succeed immediately as the adopted son of Badri Prasad ; it did not affect his rights upon the succession opening. [Reference was made to the Indian Evidence Act (I. of 1872), s. 115.]

Sir Erle Richards, K.C., and *Parikh*, for the respondents, were not called upon.

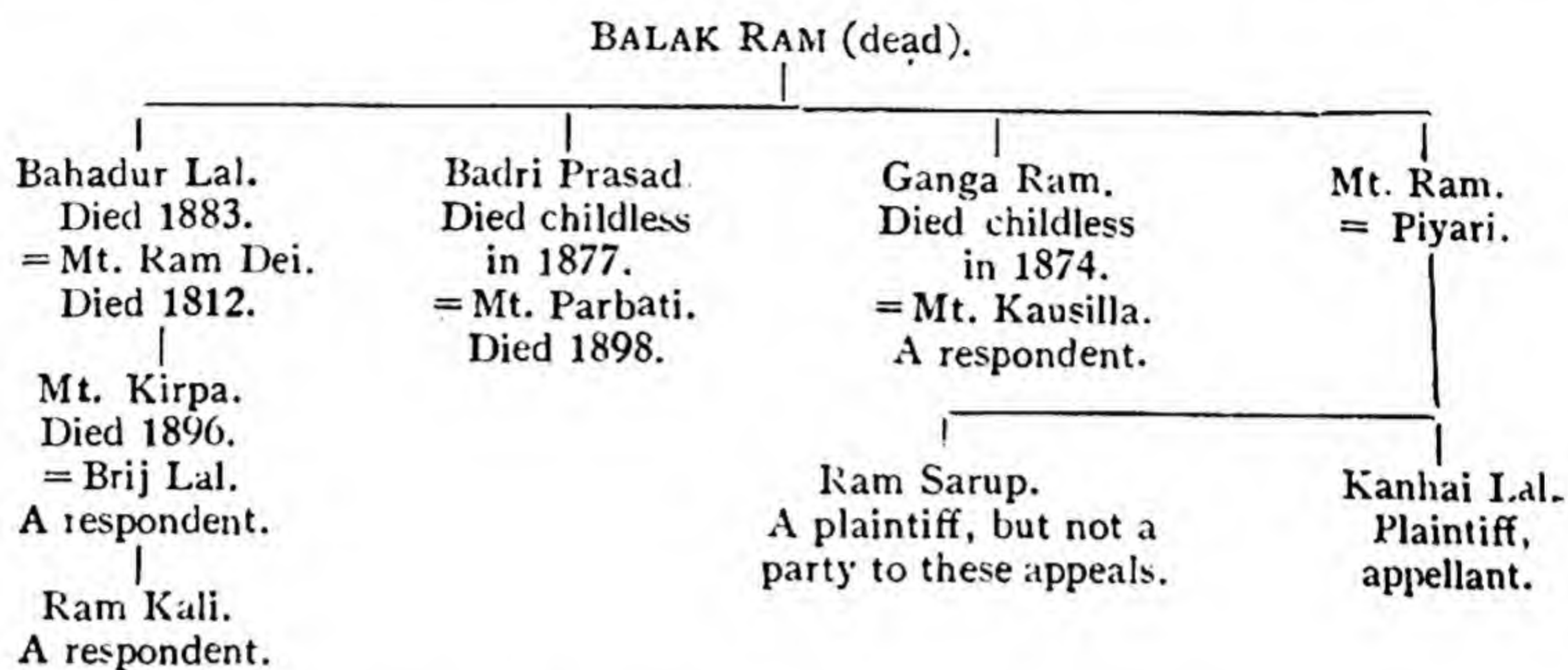
March 15. The judgment of their Lordships was delivered by

SIR JOHN EDGE. These are consolidated appeals from decrees dated June 15, 1915, of the High Court at Allahabad, made in appeals from decrees of the Court of the Subordinate Judge of Shahjahanpur. There were two suits, in each of which Kanhai Lal and his brother, Ram Sarup, were the plaintiffs. Kanhai Lal is now the appellant in the consolidated appeals. Ram Sarup's rights were established and are not now in question ; he is not a party to these appeals. In one of the suits Brij Lal and his daughter, Ram Kali, were defendants ; they are now respondents to one of the appeals. In the other suit Kausilla and Sham Lal, who claims through her, were the defendants ; they are the respondents to the other

(1) (1906) I. L. R. 31 B. 165.

(2) (1917) L. R. 45 I. A. 35.

J. C. appeals. In each suit Kanhai Lal claimed as a reversioner to one
 1918 Bahadur Lal, who died in 1883. Bahadur Lal was a member of a
 KANHAI LAL Hindu joint family descended from one Balak Ram. The pedigree
 v. of the joint family, so far as it is now material, is briefly as follows :—
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Upon the death of Ram Dei on May 14, 1912, Kanhai Lal and his brother, Ram Sarup, were the reversioners to Bahadur Lal. The only question which their Lordships have to consider in these appeals is the question whether Kanhai Lal has not been precluded from claiming as a reversioner by his having been a party to a compromise which was entered into in 1892. If he is not precluded from claiming as a reversioner he is entitled to succeed in these appeals.

At the time of his death in 1883 Bahadur Lal was by survivorship the sole owner of the family estate, and on his death his widow, Ram Dei, became entitled to that estate for her life. Parbati and Kausilla being entitled only to maintenance. The title of Ram Dei was, however, disputed by Kanhai Lal, Parbati, and Kausilla. Kanhai Lal set up a claim to the family estate, alleging that he had been adopted by Parbati to her deceased husband, Badri Prasad, and was entitled to the whole estate as such adopted son. His case was that there was a custom in the family which enabled a brother to adopt his sister's son and that Parbati had received her husband's authority to make the adoption. It is not necessary to consider whether there was any foundation for that case. Parbati's case was that the brothers Bahadur Lal, Badri Prasad, and Ganga Ram had separated ; that also was the case set up by Kausilla. Each of these widows claimed for life one-third of the family estate. Parbati

also alleged that she had validly adopted Kanhai Lal to her deceased husband Badri Prasad. J. C. 1918

In order to protect her own interests and the interests of her daughter Kirpa, who was then living, Ram Dei brought two suits in the Court of the Subordinate Judge of Shahjahanpur. The earlier of those suits was brought on January 20, 1891, against Kanhai Lal and Parbati, and in that suit Ram Dei claimed a declaration that the alleged adoption of Kanhai Lal by Parbati was null and void. That suit was dismissed by the Subordinate Judge on the technical objection that the plaint had not been properly verified. From the decree dismissing that suit Ram Dei appealed to the High Court at Allahabad. The later of those two suits was brought on February 4, 1892, against Parbati and Kausilla, and in it Ram Dei, claimed amongst other reliefs a declaration that her late husband, Bahadur Lal, had been the owner and in possession of the entire property of the joint family ; that after his death she, Ram Dei, was in possession of and entitled to that property according to Hindu law ; and that Parbati and Kausilla had no right other than that of maintenance.

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Before the suit of February 4, 1892, came on for trial Ram Dei, Parbati, Kausilla, Kirpa, and Kanhai Lal had entered, on August 1, 1892, into the following agreement of compromise :—

[The deed of compromise, which was set out in full in their Lordships' judgment, was shortly to the following effect : After reciting the existence of disputes between the parties, of whom Kanhai Lal was referred to as "the adopted son of Parbati," the parties declared that they had appointed a named referee, and that he should divide the property left by Bahadur Lal into four equal lots ; Ram Dei, Parbati, Kausilla, and Kirpa were each to draw one lot and to apply for mutation of names in respect of the lot drawn ; Kirpa and Kanhai Lal declared that she and he would have no claim against any sharer ; every sharer was to be the owner and possessor of her lot with power to transfer. The deed was executed by each of the parties.]

The arbitrator made two awards dated respectively January 12 and 13, 1893. That of January 12, 1893, was filed in the suit of February 4, 1892, in which Parbati and Kausilla were defendants and that suit was dismissed as withdrawn by Ram Dei. The appeal

J. C. to the High Court in the suit of January 20, 1891, was not supported,
1918 and was dismissed.

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Under the awards of the arbitrator one-fourth of the family property was allotted to each of Ram Dei, Kirpa, Parbati, and Kausilla, and they respectively obtained possession of the properties allotted to them. In the award of January 13, 1893, the arbitrator stated: "Kanhai Lal has been adopted by Parbati, but he has nothing to do with the other musammats' property as such adopted son. Nor has he now any claim to their property. As regards the matter between Parbati and Kanhai Lal, it is not necessary to explain his rights in this award. Kanhai Lal's rights in the property comprised in Parbati's lot are quite safe."

So far as appears by the agreement of compromise and the awards, Kanhai Lal got no share in the family property, but in fact he got the one-fourth share which was allotted to Parbati, and he further obtained the benefit of having the validity of his adoption by Parbati left undecided by a Court of law. On August 22, 1898, Parbati executed in favour of Kanhai Lal a deed of relinquishment of the property which had been allotted to her under the compromise and the award of January 13, 1893.

[The deed, which was set out in full in their Lordships' judgment, recited that the executant, with the permission of her deceased husband, had adopted Kanhai Lal, and declared that Kanhai Lal was the owner of all her deceased husband's property, and that the executant relinquished her claim to the said property (scheduled to the deed); it provided that the said property, which was standing in her name, should be entered in the name of Kanhai Lal.]

In accordance with that deed of relinquishment Kanhai Lal obtained mutation of names in his own favour, and he has hitherto enjoyed that share of Parbati as his own property, and his right to it has not been questioned in either of the present suits. The properties which Kanhai Lal has claimed in these suits as a reversioner to Bahadur Lal are the properties which were allotted in January, 1893, to Ram Dei, Kirpa, and Kausilla respectively.

The suits in which these appeals have arisen were not tried by the same Subordinate Judge. In one of these suits the Subordinate Judge held that Kanhai Lal was precluded by his having been a party to the compromise from now claiming as a reversioner. In

the other of these suits a different Subordinate Judge decided that Kanhai Lal was as a reversioner not bound by the compromise. The decrees of the Court of the Subordinate Judge were appealed to the High Court, and the appeals were considered by the High Court in one judgment. The High Court decided that Kanhai Lal having been a party to the agreement of compromise of 1892, and having taken a benefit under that settlement of the dispute, was bound by it and could not go behind it. The result was that Kanhai Lal's suits were dismissed. From the decrees of the High Court made in accordance with that judgment these appeals have been brought.

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It has been contended on behalf of Kanhai Lal that the agreement of compromise of 1892 could not deprive him of his right to claim as reversioner unless it is capable of being treated as a conveyance of his right as a reversioner, and that he did not intend in 1892 to convey or assign such right when it might accrue to him. As it now appears, Kanhai Lal was not a reversioner in 1892, and did not become a reversioner until Ram Dei died in 1912. All the interest which he had in the property of the family in 1892 was the mere possibility of becoming an immediate reversioner in case he should be living when Ram Dei might die, and when Bahadur Lal's daughter, Kirpa, might die without a son. It was also contended on his behalf that Kanhai Lal in 1892, whatever his intention may have been, was not in law competent to convey or relinquish any future possible right as a reversioner, and as an authority in support of that contention the decision of the High Court at Bombay in *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (1) was relied upon. That decision is not in point. There is no question here of a conveyance of, or of an agreement to convey any future right or expectancy, or of an agreement to relinquish, any future right or expectancy. The question here is whether Kanhai Lal did not by his acts in 1892 debar himself from now claiming as a reversioner.

The facts in this case are simple. In 1892 the family was a Hindu joint family to which the ordinary Hindu law applied. All the sons of Balak Ram had died. Ganga Ram had died childless in 1874, and Badri Prasad had died childless in 1877. Bahadur Lal had died

(1) I. L. R. 31 B. 165.

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sonless in 1883, leaving his widow, Ram Dei, surviving him. Ram Dei became, on the death of Bahadur Lal, entitled for life to a Hindu widow's right to the whole of the family property. Kanhai Lal had then no right of any kind to any share in the family property, but he set up a claim to the whole property based on the allegation that he had been validly adopted by Parbati to her deceased husband, Badri Prasad. If that claim had been substantiated by proof of a valid adoption, Kanhai Lal would have been entitled to the whole family property, and Ram Dei would have been entitled merely to maintenance. Although as a general rule of Hindu law a man cannot adopt his sister's son, the claim was a serious one. Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste), which governed the family, a man could lawfully adopt his sister's son, and he alleged that Badri Prasad had given Parbati authority to make the adoption, and that he, Kanhai Lal, had been validly adopted to Badri Prasad. That Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by Parbati and it must have influenced Ram Dei, who was induced, doubtless mainly by that claim, to consent to a division of the family property, in which she obtained for herself merely a one-fourth share. The claims which were set up by Parbati and Kausilla that the three sons of Balak Ram had separated must also have influenced Ram Dei to agree to the compromise of 1892. Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Ram Dei, against her own interests and those of her daughter, Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed. In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner.

Their Lordships will advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for appellant : *Barrow, Rogers & Nevill.*

Solicitor for respondents : *E. Dalgado.*

NARMA AND OTHERS	APPELLANTS ;	J. C.*
AND		
MUNICIPAL COMMISSIONER FOR BOMBAY } AND OTHERS }	RESPONDENTS.	1918 March 14.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Bombay Municipality—Public Streets—Powers—Acquisition of adjoining Land—Compensation—Preservation of Regular Line—Collateral Object—City of Bombay Municipal Act (III. of 1888 and V. of 1905), ss. 296, 297, 301.

By s. 297 of the City of Bombay Municipal Act the Municipal Commissioner may prescribe a regular line on each side of a public street, and if the line is so prescribed that any land not vesting in the corporation falls within it, the Commissioner may, by s. 299, take possession of it on behalf of the corporation, the former owner receiving compensation under s. 301. Sects. 297 to 301 are headed in the Act "Preservation of regular line in public streets." By s. 296 the Commissioner has power to acquire any land required for widening, extending, or otherwise improving any public street, subject to the payment of compensation under the Land Acquisition Act (I. of 1894).

In 1909 the Commissioner prescribed a line on one side of a public street so that land belonging to the appellants fell within it, and, having served them with notice, took possession. The Commissioner wished to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level crossings. The appellants contended that the procedure under ss. 297, 299, and 301 was inapplicable and the proceedings ultra vires, and that the land could only be acquired subject to payment of compensation under the Land Acquisition Act, 1894:—

Held, that the powers given by ss. 297 and 299 of the Act could be exercised although the motive of the Commissioner, who acted in good faith and in the discharge of his duties, was not to preserve the regular line of the street, and that consequently the compensation payable to the appellants was to be calculated according to s. 301 of the Act, and not under the Land Acquisition Act, 1894.

APPEAL by special leave from a judgment and decree of the High Court (August 9, 1912) affirming, subject to a modification, a decree of Beaman J.

The suit was instituted by the appellants in the High Court

* *Present*: EARL LOREBURN, LORD DUNEDIN, and LORD SUMNER.

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under circumstances which sufficiently appear from the judgment of their Lordships.

The appellants claimed (1.) restoration of possession of their land, or a declaration that the action of the Commissioner in purporting to prescribe the "regular line" was ultra vires; (2.) an order, if necessary, upon the respondents to proceed under the Land Acquisition Act; and (3.) an injunction and damages.

The trial judge, Beaman J., dismissed the suit, holding that the proper remedy open to the appellants was by compensation under s. 301 of the Act.

Upon appeal the learned judges (Sir Basil Scott C. J. and Chandavarkar J.) varied the decree. It appeared that the prescription of the regular line in respect of which possession of the land was taken on July 7, 1909, was not sanctioned by the corporation until October, and that thereupon fresh notices were served upon the appellants, and possession again taken on December 3, 1909. The appellants, by consent of the parties, were decreed by way of damages for unlawful possession interest for the period between those dates at 6 per cent. upon the compensation payable. Subject to that modification, as to which no question arose upon the present appeal, the decree of Beaman J. was affirmed.

1918. Feb. 19. *Sir William Garth and Parikh (De Gruyther, K.C., with them)*, for the appellants. The power to take land under s. 299 of the City of Bombay Municipal Act, 1888, is confined to cases where the land is required to preserve the regular line of the street. That appears from the terms of ss. 297 and 299, and from the group heading, which is "Preservation of regular line in public street." In the present case the land was not required for that purpose, but for the erection of a bridge on which the street was to be carried over the railway. There is no power to erect buildings of any kind upon land acquired under s. 299. If there was power under the Act to acquire the land it was under s. 296; under that section the appellants are entitled to compensation under the Land Acquisition Act, 1894. The power given by s. 299 cannot properly be exercised for a collateral purpose: *Galloway v. Corporation of London* (1); *Gard v. Commissioners of Sewers*. (2)

(1) (1866) L. R. 1 H. L. 34, 43.

(2) (1885) 28 Ch. D. 486, 498.

P. O. Lawrence, K. C., and Dunne, K. C., for the respondents, were not called upon.

March 14. The judgment of their Lordships was delivered by

LORD SUMNER. By the City of Bombay Municipal Act, 1883, s. 289, the Municipal Commissioner for the city of Bombay has under his control all public streets within the city, and may from time to time widen, extend, or otherwise improve any such street, or cause the soil thereof to be raised, lowered, or altered, subject to the sanction of the corporation in certain events. By s. 297 he may prescribe a line on each side of any public street, and, subject to receiving the necessary authority, may from time to time prescribe a fresh line in substitution therefor, and the line so prescribed shall be called "the regular line of the street." If the line is so drawn that any land not vesting in the corporation falls within it, the Commissioner may, by s. 299, take possession of it on the corporation's behalf, which has the effect of acquiring it for the corporation, and thereupon the land so acquired shall thenceforward be deemed a part of the public street, and the former owner will be entitled to receive certain compensation as prescribed by s. 301. The Commissioner further has power, under s. 296, to acquire any land required for the purpose of widening, extending, or otherwise improving any public street, subject among other things to the payment of compensation in accordance with the Land Acquisition Act, 1894. The only question in this appeal is whether the compensation to be paid for certain land of the appellants, which the Commissioner has acquired, is to be calculated according to the provisions of s. 301 of the City of Bombay Municipal Act or according to those of the Land Acquisition Act.

Elphinstone Road, which is within the area of the Municipal Corporation of Bombay, intersects at right angles and by level crossings two railway lines, which run parallel with and close to one another at Parel Station, namely, the Bombay, Baroda, and Central India Railway and the Great Indian Peninsular Railway. The appellants were the owners of a plot of land fronting the road and lying in the north-east angle between the road and the railways. In 1909 the Commissioner prescribed a line on the north side of the road as the regular line of the street, which was so drawn that part

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of the appellant's land, namely, the front part, fell within it, and he duly gave notices and took possession of this land in order that, within s. 299, this part of the appellants' land might thus be acquired by the corporation, and might thenceforward be deemed part of Elphinstone Road. In point of fact, the line so prescribed was in substitution for an earlier prescribed line, but, in the view of their Lordships, nothing now turns on this.

That the Commissioner meant to prescribe the regular line of the street under s. 297, and that in form he purported to do so, and in fact actually did so, there can be no manner of doubt. The whole object of what he was doing depended on its being an exercise of the powers given by this section. Equally little is there any doubt why he did so. Even if he concerned himself to some extent with prescribing a regular line, simply in lieu of the somewhat irregular line which previously bounded Elphinstone Road on the north, his main object at any rate was a different one, and he has never made any secret of it. Whether what he did was in the circumstances within the Act or without it, whether or not the exercise of his powers was a harsh application of the section, unforeseen by those who framed it, their Lordships think it quite clear that he acted in good faith, for the benefit, as he supposed, of the corporation which he represented, and, as he conceived, in the discharge of his duty. Sooner or later Elphinstone Road must have been carried over these two railways by a bridge. A double level crossing could not be indefinitely maintained there. Such a bridge involved approaches of considerable length and height, and the embankment with its retaining walls and the provision of access to land adjoining it would require a site considerably wider than the existing width of Elphinstone Road. For this purpose the Commissioner wished to acquire additional land, and to do so on the cheapest possible terms, and so he first of all prescribed a line and then took possession of the part of the appellants' land which fell within that line. Thus he avoided having to proceed under the Land Acquisition Act.

The appellants' whole contention is that this exercise of the Commissioner's power was good or bad according as he acted with a single eye to the creation and preservation of a regular boundary to Elphinstone Road as an end in itself, or with the ulterior object

of extending the road in order to be able to raise it by an incline to the level of the necessary overbridge.

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The contention must stand or fall on the construction of the Bombay Act. There is no word in the Act which prescribes the frame of mind in which the Commissioner is to exercise the powers given by s. 297, or which restricts the objects for which he is to exercise them to the mere regulation of the street in question or to the creation or preservation of a regular line in it. Even if it were proved, as it is not, that the creation and preservation of a regular line on the north side of the road was no part of the Commissioner's object, though it certainly was an incidental result of his scheme, their Lordships can find nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street in 1909.

Cases in which it has been held that powers conferred only for a statutory purpose cannot be validly exercised for a different purpose are not in point. Such an exercise of the powers is outside the Act which confers them. Here the exercise of the powers was within the Act, for it was in strict conformity with the terms of the Act. "Preservation of regular line in public streets" is the heading to the group of sections beginning with s. 297, but this cannot be pressed into a constructive limitation upon the exercise of the powers given by the express words of the Act. The preservation of the line of the street is not laid down as the definite and sole object for which the power is to be exercised. It may be the immediate effect of that exercise, but certainly it is not more. The case was very fully and cogently dealt with by the learned Chief Justice of Bombay in the High Court of Bombay, and their Lordships think it unnecessary to discuss the matter further. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellants : *E. Dalgado.*

Solicitors for respondents : *Cameron, Kemm & Co.*

J. C.* HET RAM APPELLANT ;
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 SHADI LAL AND OTHERS RESPONDENTS.
 March 15.
 — ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mortgage—Decree for Sale—Extinguishment of Security—Unenforceable Decree—Second Mortgagee—Transfer of Property Act (IV. of 1884), ss. 85, 89.

A decree made under s. 89 of the Transfer of Property Act, 1884, for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished.

Where, therefore, the owner of property subject to two mortgages has succeeded as her to the first mortgagee, who had obtained but not executed a decree under s. 89, if that decree is inoperative against the second mortgagee, either because the second mortgagee was not made a defendant under s. 85, or because its enforcement has become barred by limitation, the second mortgagee is entitled to a decree for sale of the mortgaged property free from any charge in favour of the owner.

APPEAL from a judgment and decree of the High Court (May 13, 1913) varying a decree of the Court of the Subordinate Judge of Moradabad.

The appellant, in 1883, purchased immovable property which was subject to a simple mortgage made in 1880 in favour of one Lachman Das, and to a further mortgage made in 1881 in favour of the first respondent, and took possession.

In 1895 Lachman Das obtained against the mortgagor and the appellant a decree absolute for sale under s. 89 of the Transfer of Property Act, 1884, upon his mortgage of 1880. The first respondent was not made a defendant to the suit although his mortgage of 1881 was duly registered. Later in 1892 Lachman Das died, without having executed the decree, and was succeeded by the appellant as heir. The appellant took no steps under the decree.

In 1910 the first respondent instituted the present suit against

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the mortgagors, the appellant, and other transferees of the property mortgaged (now joined as respondents), for a sale decree under his mortgage of 1880.

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The trial judge made a decree for sale, but ordered that the sale should be subject to the prior mortgage right of the appellant under the mortgage of 1880.

Upon appeal to the High Court the decree was varied by omitting the direction in favour of the appellant. The learned judges (Richards C.J. and Lyle J.) said : " We think that if Het Ram had acquired the mortgage of 1880 while he was still owner of the property subject only to the mortgage now sued upon, he could probably set up the equity of his prior mortgage of 1880. But it seems to us that Het Ram cannot be regarded as the owner of the mortgage of 1880. The (previous) suit was brought upon the foot of that mortgage and a decree obtained which has never been executed. We think that the mortgage merged in the decree, and that the acquiring of the decree by Het Ram cannot be said to have vested in him the mortgage upon which the decree was based. Neither is he in the position of a person who has purchased upon the foot of a sale in execution of the decree of 1880."

1918. Feb. 21, 22. *Dunne, K.C.*, and *T. B. W. Ramsay*, for the appellant. The decree of the trial judge was right. The appellant succeeded to the rights of Lachman Das under the prior mortgage. There was thereupon no merger of those rights, and the appellant was entitled in justice, equity, and good conscience to the benefit of that mortgage : *Gokuldoss v. Rambux Seochand* (1); *Dinobundhu v. Jogmaya* (2); *Mahomed Ibrahim v. Ambika*. (3) The decree of 1892 did not extinguish the prior mortgage right as against the first respondent, since the latter was not a party to the decree. Further, the appellant could not enforce the decree, since he was owner of the mortgaged property.

Dube, for the first respondent. Under s. 89 of the Transfer of Property Act the security contained in the prior mortgage ceased to exist upon the decree absolute being obtained : *Ram Singhji v. Chunni Lal*. (4) The appellant has no rights against the first

(1) (1884) L. R. 11 I. A. 126.

(3) (1912) L. R. 39 I. A. 68.

(2) (1901) L. R. 29 I. A. 9.

(4) (1897) I. L. R. 19 A. 205.

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respondent upon the decree. First, because the first respondent was not made a defendant, as (under s. 85) he should have been. The mortgage of 1880 being registered, Lachman Das had notice of it : *Mahomed Ibrahim v. Ambika*. (1) Secondly, because under Sched. II., art. 179, of the Limitation Act, 1877, a period of three years was provided for enforcing the decree. Time began to run from the date of the decree absolute : *Mahabir Prasad v. Sital Singh* (2) ; once it began to run there was no suspension owing to the fusion of the mortgagor and mortgagee interests : *Lala Soni Ram v. Kanhaiya Lal*. (3) The appellant could have taken steps upon the decree under s. 232 of the Code of Civil Procedure, 1882.

Dunne, K.C., in reply. The provisions as to limitation do not apply, since the appellant is not suing. Sect. 28 of the Limitation Act does not affect the equitable right which the appellant claims. The appellant could not enforce the decree against his own property ; it would therefore be inequitable to hold that he is deprived of his rights under the prior mortgage.

March 15. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in a short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under Order XXXIV., r. 2, of the Code of Civil Procedure, 1908, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This earlier mortgage was dated February 25, 1880 ; Shadi Ram's mortgage was dated October 15, 1881.

The appellant had become the successor in title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1892 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgage and in 1895 obtained a decree for a sale under s. 89 of the Transfer of Property Act, 1882.

(1) L. R. 39 I. A. 68, 82.

(2) (1897) I. L. R. 19 A. 520.

(3) (1913) I. R. 40 I. A. 74, 85.

But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor in title took any steps to execute, and under art. 179 of the Second Schedule to the Indian Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the decree becoming absolute. It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered, and that the first mortgagee must be taken to have had notice of it when he brought his suit and obtained a decree for sale in 1892.

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The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of s. 58 of the Transfer of Property Act, and under s. 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as s. 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under s. 85 the first mortgagee was bound to make the second mortgagee a party to his suit for sale, and as he did not do so the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Sect. 89 is important. Under this section, where an order for sale under s. 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made, a decree absolute may be made such as was made in 1895, for sale and for payment of the amount realized into Court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

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As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for first respondent : *Pyke, Franklin & Gould.*

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RAJINDRA BAHADUR SINGH (SINCE DECEASED)	} APPELLANT;
AND		
RANI RAGHUBANS KUNWAR (SINCE DECEASED)	} RESPONDENT.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Hindu Law—Succession—Oudh Taluqa—Primogeniture Sanad—“Accretions”—Property purchased by Taluqdar—Intention to vary Descent—Villages substituted by Government—House allotted for use of Taluqdar.

The Crown has power in British India by a grant of lands to limit their descent in any way it pleases, but a subject has no power to impose upon lands, or other property, any limitation of descent at variance with the ordinary law applicable.

In 1861 the Crown granted a taluqa to a Hindu, subject to a primogeniture sanad. Upon an appeal to the Privy Council in a

* *Present*: VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

suit as to the succession to the property of a deceased holder of the taluqa, it was declared in 1905 that the "taluka as constituted at the date of the sanad, with accretions (if any) or properties (if any) appurtenant to the taluka," passed to the appellant but that the residue of the property passed to the respondent, and the case was remitted for determination under that declaration. No family custom of primogeniture was alleged. Upon appeal from final decrees of the Court of the Judicial Commissioner:—

Held, that under the declaration villages substituted by the Government after 1861 for villages held under the sanad, and a house granted by the Government after 1861 to the taluqdar for his use as taluqdar, passed to the appellant, but that villages purchased after 1861 by the deceased taluqdar passed to the respondent, whether or not the purchaser intended to incorporate them with the taluqa.

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APPEAL and CROSS-APPEAL from a judgment and decree of the Court of the Judicial Commissioner (March 4, 1907) and connected appeal from a judgment and decree of that Court (January 21, 1909), each of the said decrees varying reports of the Subordinate Judge of Sitapur.

The present appeals were as to the effect, in the circumstances of the case, of an Order in Council made in 1905 upon an appeal (1) to the Privy Council in the suit. The facts, including the terms of the Order, appear from the judgment of their Lordships.

In the arguments reliance was placed upon the further facts that the name of the taluqdar had been entered in lists 1 and 2 prepared under the Oudh Estates Act (I. of 1869) and that the property purchased by the deceased taluqdar had been purchased out of income derived from the taluqa.

The Court of the Judicial Commissioner remitted the matter to the Subordinate Judge for inquiry and report. A certified copy of the sanad of 1861 was in evidence, but there was no list of the villages included in it; the chief source of information on that point being the summary settlement concluded in October, 1859, and a decree of the Settlement Officer in 1869 in the taluqdar's favour.

The Subordinate Judge reported that of the fifty-eight villages which remained in dispute twenty-seven were part of the taluqa, or accretions to or appurtenant to it, and that thirty-one were not. He held that the villages substituted by the Government after

(1) (1905) L. R. 32 I. A. 203.

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1861 formed part of the taluqa. With regard to those villages which he found to have been purchased after 1861, save as to half of Hasnapur, he said that there was nothing to indicate that Balbhaddar Singh had intended to incorporate them with the estate; he accordingly held that they passed to the Rani. From the fact, however, that half the village of Hasnapur was part of the taluqa in 1861, he inferred that the other half had been purchased with the intention of incorporating it with the taluqa; he therefore held that it passed to the appellant.

Cross-objections to the report were made to the Court of the Judicial Commissioner. Scott J.C. by his judgment thereon stated that the case had been argued upon both sides as depending upon intention. He, however, was of opinion that the words "accretions" and "appurtenant" in the Order must be given their technical meanings, and that even if Balbhaddar Singh had intended to add the purchased villages to the taluqa that did not bring them within the terms of the Order. He agreed with the report in holding that the substituted villages formed part of the taluqa. He found that the report should be varied by adding the villages of Sarkanpur Marhuma, Puraina, and Patti Bhupatpur to those awarded to the appellant, and by adding Chak Sarkhanpur, Chak Simri, and half of Hasnapur to those awarded to the Rani. Evans J. C. adopted the judgment of Scott J.C.

The present appeal and cross-appeal were from their decree.

The Subordinate Judge having omitted to deal in his report with two houses and movable property which were in dispute, the matter was remitted to him for further report. He found that a house at Lucknow (the facts as to which appear from their Lordships' judgment) passed as taluqdari property, but that the other house and the movable property did not.

Upon objections to the Court of the Judicial Commissioner the report was varied by decreeing both houses and the movable property to the Rani as non-taluqdari property. Chamier J.C. in the course of his judgment rejected the view that the taluqdar by declaration or intention could cause property acquired by him after 1861 to descend with the taluqa; on this point he repeated in substance his judgment (reported at 11 Oudh Cases, 256) in another suit to which the present parties were parties. With regard to the

house at Lucknow, he was of opinion that it could not be concluded that the sanad granting the house, or the house for which it was substituted, contained language similar to the primogeniture sanad by which the taluqa was granted.

The second appeal was by the taluqdar from that decree.

1918. Jan. 22, 24, 29, 31. *De Gruyther, K.C.*, and *Kyffin*, for the appellant (taludkar). The whole of the property in dispute passed to the appellant by virtue of family custom. The name of the taluqdar being entered in list 2, prepared under the Oudh Estates Act (I. of 1869), a presumption arose, under s. 10, that there was a family custom of descent to a single heir, and that custom attached to all acquired property which the taluqdar intended by him to be incorporated with the family estate : *Thakur Ishri Singh v. Baldeo Singh* (1) ; *Janki Pershad Singh v. Dwarka Pershad Singh* (2) ; *Murtaza Husain Khan v. Mahomed Yasin*. (3) If the property devolved upon a single heir it cannot be denied that the present taluqdar was entitled to succeed. The sanad of 1861 recognized the existence of a family custom of primogeniture and perpetuated it. The villages were purchased out of the income of the taluqa ; it is consequently to be inferred that the intention was to incorporate them with the estate : *Gonda Kooer v. Kooer Oodey Singh* (4) ; *Isri Dut v. Hansbutti* (5) ; *Sheo Lochun v. Saheb* (6) ; *Sarabjit v. Indarjit* (7) ; *Lal Bahadur v. Kanhai Lal*. (8) The villages purchased out of the income of the taluqa were accretions to it within the meaning and intention of the previous judgment of the Board ; so also was the movable property, since it was derived from the taluqa. The house in dispute was intended by the Government to form part of the taluqdari estate.

Dunne, K.C., and *Dube*, for the respondent (the Rani). The facts as to the property now in dispute were not before the Board upon the previous hearing, and no view as to its descent was intended to be expressed. There was no evidence that the taluqdar intended to incorporate the purchased villages with the taluqa.

(1) (1884) L. R. 11 I. A. 135.

(2) (1913) L. R. 40 I. A. 170.

(3) (1916) L. R. 43 I. A. 269.

(4) (1874) 14 Beng. L. R. 159.

(5) (1883) L. R. 10 I. A. 150.

(6) (1887) L. R. 14 I. A. 63.

(7) (1905) I.L. R. 27 A. 203.

(8) (1907) L. R. 34 I. A. 65.

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But in any case he was not competent by intention to make them descend in a manner at variance with their descent under the ordinary Hindu law. It was not suggested in the suit that there was a family custom of primogeniture; the only custom alleged was that females were excluded from succession; that custom was negatived by concurrent findings. The taluqdar, therefore, could not make the non-taluqdari property descend according to the rule of primogeniture impressed by the sanad upon the taluqa. The judgments of the Board referred to as to the descent of non-taluqdari property of a taluqdar whose name is entered in list 2 consequently do not support the appellant. The decisions referred to as to property purchased by Hindu widows out of the family estate, and as to members of a joint Hindu family incorporating self-acquired property with the joint family property, have no application, there being there a choice of two modes of descent under Hindu law according to the nature of the property. With regard to the house, the sanad was not produced, and it cannot be inferred that it was in the same terms as the primogeniture sanad constituting the taluqa. [Reference was also made to the Crown Grants Act (XV. of 1895), s. 2, and the Oudh Estates Act (I. of 1869), s. 7.]

De Gruyther, K.C., replied.

Feb. 25. The judgment of their Lordships was delivered by

SIR JOHN EDGE. The suit in which these consolidated appeals have arisen came on appeal before the Board in 1905. The Board which heard the appeal finally decided several important questions which were in dispute between the parties, but did not finally dispose of some other questions which related to portions of the property which were in dispute in the suit, and in respect of the questions which were not then finally decided advised His Majesty that these questions should be remanded to the Court of the Judicial Commissioner of Oudh, with power to that Court to remit the case to the Court of the Subordinate Judge for inquiry. The judgment of the Board is reported at L. R. 32 I. A. 203. The Court of the Judicial Commissioner on March 4, 1907, made a decree which dealt with some of the questions in dispute, and on January 21, 1909, a further decree, which dealt with the remaining questions

in dispute, and from those decrees these consolidated appeals have been brought. The original parties to the suit are dead, and to understand the position of the parties to these consolidated appeals it is advisable to state, so far as it is material for that purpose, the pedigree of the family to which they belong, so far as it has been proved or admitted in this litigation. The members of the family are Hindus.

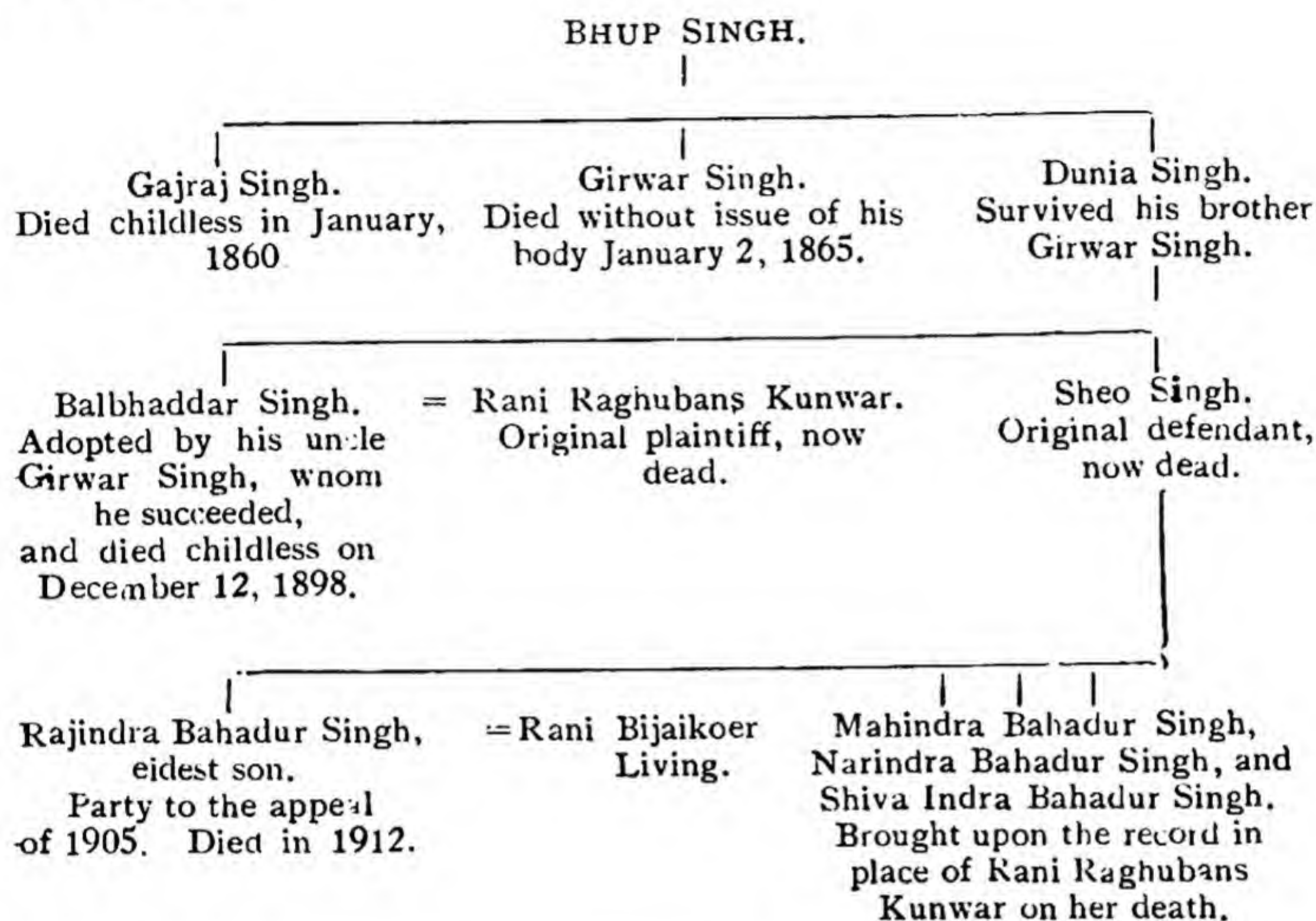
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The property to which the suit related was property, moveable and immoveable, of which Balbhaddar Singh died possessed on December 12, 1898. On his death his widow Rani Raghubans Kunwar and his brother Sheo Singh each claimed adversely to the other all the property of which Balbhaddar Singh had died possessed; the Court of Revenue made an order for the mutation of names in favour of Sheo Singh, and he obtained possession of all the property, movable and immovable. Rani Raghubans Kunwar on February 6, 1900, brought this suit against Sheo Singh for possession of all the movable and immovable property. She alleged that Balbhaddar Singh had been adopted by his uncle Girwar Singh, and that Girwar Singh had by his will devised all his property to Balbhaddar Singh, who had enjoyed it until his death. Her suit was resisted by Sheo Singh, who alleged that all the property claimed by her appertained to taluqa Mahewa and was impartible; that by a

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custom in the family females were excluded from the inheritance; that the succession to the taluqa was governed by s. 22 of the Oudh Estates Act (I. of 1869), under which he claimed that a brother was entitled in priority to the widow; and he denied that Balbhaddar Singh had been adopted by Girwar Singh. Sheo Singh relied upon a sanad of October 19, 1859, by which the Government had granted taluqa Mahewa to Gajraj Singh and his heirs without other limitation of the line of inheritance. At some period of the litigation a copy of a sanad which was granted by the Government to Girwar Singh in 1861 was produced, and the Board in 1905 held that the copy was admissible in evidence, and that Girwar Singh had in fact surrendered to the Government the sanad which had been granted to Gajraj Singh in 1859 and the estate which had been granted by it, and in lieu of that sanad had accepted the sanad of 1861. The sanad of 1861 said expressly: "It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

The Courts in India had held that the sanad of 1861 could not in law operate to substitute the line of descent prescribed by it for the line of descent prescribed by the earlier sanad of 1859, and having found that Balbhaddar Singh had been adopted by Girwar Singh and had succeeded to taluqa Mahewa under the will of Girwar Singh, and that the alleged custom excluding females from the inheritance had not been proved, gave Rani Raghubans Kunwar a decree for possession. That alleged custom excluding females from inheritance was the only custom of the family which Sheo Singh attempted to prove.

In the appeal which came before the Board in 1905 from the decree of the Court of the Judicial Commissioner it was contended on behalf of Rani Raghubans Kunwar that Girwar Singh was not competent to surrender to the Government the sanad of 1859; that the Government, having granted by the sanad of 1859 the estate to Gajraj Singh and his heirs, had nothing left to grant to Girwar Singh in 1861; and, further, that the Government had no power to create by the grant of 1861 an estate descending by any rule of inheritance that was contrary to the ordinary law, which, as the family were Hindus, was the Hindu law. The Board, however,

held that Girwar Singh, being entitled by inheritance to everything that had passed to Gajraj Singh under the sanad of 1859, was competent to surrender the sanad of 1859 and to accept instead of it the sanad of 1861, and had surrendered the sanad of 1859 and the estate which had passed under it, and that the Government was competent to grant the sanad of 1861. As to the contention that the Government had no power to grant to a Hindu, as it did by the sanad of 1861, an estate which should descend on an intestacy to the nearest male heir according to the rule of primogeniture, their Lordships said : " Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, the Crown Grants Act (Act XV. of 1895). That Act recites, amongst other things, that doubts have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers made by it or under its authority, and it is expedient to remove such doubts. And s. 3 enacts that ' all provisions, restrictions, conditions, and limitations over contained in any such grant or transfer, as aforesaid, shall be valid and take effect according to their tenor, any rule of law, statute, or enactment of the Legislature to the contrary notwithstanding.' "

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When the appeal was being argued before the Board in 1905 the arguments addressed to their Lordships related only to the right to the possession of taluqa Mahewa on the death of Balbhaddar Singh, and it appears to have been overlooked by counsel during the arguments that the appeal also related to other property which was alleged to have been acquired by Balbhaddar Singh, and which had not formed part of the property granted by the sanad of 1861. Before the judgment of the Board was delivered in 1905 the attention of their Lordships was drawn by counsel to the fact that the appeal also related to such other property. In their judgment of 1905 their Lordships consequently said : " The present appeal relates mainly to taluqa Mahewa, and the argument before their Lordships dealt only with it. The principle adopted in this judgment only applies to that taluqa, including, of course, any property that may have accreted to it since the date of the sanad under which it is held. It has been pointed out by counsel that the suit out of which the appeal arises related also to property said to have been

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acquired apart from the taluqa. It seems clear that their Lordships have not materials before them to enable them to define what property (if any) other than the original contents of the taluqa now passes as part of it." Their Lordships held that taluqa Mahewa, as constituted at the date of the sanad of 1861, with accretions (if any) or properties (if any) appurtenant to the taluqa, had, on the death of Balbhaddar Singh, passed in accordance with the limitations of that sanad to Sheo Singh as the next male heir according to the rule of primogeniture, and humbly advised His Majesty to make a declaration that the taluqa Mahewa, as constituted at the date of the sanad, with accretions (if any) or properties (if any) appurtenant to the taluqa, has passed to the appellant, and that as to any other property of the deceased the decrees of the Courts below are not affected, and to order that it be left to the Court of the Judicial Commissioner, if it be found that there is real controversy on the point, either itself to determine what property falls under one category and what under the other, or to remit the case for inquiry to the Court of the Subordinate Judge, and to order that, so far as may be necessary to give effect to the first part of the foregoing declaration, the decrees of the Courts below ought to be discharged and the suit dismissed.

That declaration was made by the Order in Council, and the Court of the Judicial Commissioner remitted the case for inquiry to the Court of the Subordinate Judge.

The Court of the Subordinate Judge made two reports, one relating to the villages in dispute, and the other to a house at Sitapur, a house at Lucknow, and movable property of which Balbhaddar Singh had died possessed. Objections which were taken to each of those reports came at different dates before the Court of the Judicial Commissioner, and from the decrees of that Court made upon those reports these consolidated appeals have been brought.

Some of the learned judges of the Court of the Judicial Commissioner misunderstood what their Lordships meant in 1905 by the terms "accretions" and "properties appurtenant" to taluqa Mahewa. Their Lordships obviously did not mean to limit accretions to accretions to land which had gradually and imperceptibly by the action of water gone to the owner of the adjacent soil. No

accretion of that nature had apparently been suggested by the parties to the suit. What was suggested was that Balbhaddar Singh had acquired property by purchase and had added it to the estate which had been granted by the sanad of 1861 to Girwar Singh. The facts were not before their Lordships in 1905 which would have enabled them to decide whether any lands had accreted to taluqa Mahewa as it was constituted at the date of that sanad. The Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case. Sir Edward Chamier, then Mr. Chamier, Judicial Commissioner of Oudh, in his judgment on some objections taken to the second report of the Court of the Subordinate Judge, correctly stated the law in this respect as to the power of a subject, thus: "I take it that it is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh."

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With that statement as to the law their Lordships agree. It follows that, in ascertaining what were the lands claimed by Rani Raghubans Kunwar in respect of which her suit was not dismissed in 1905, it must be ascertained what were the lands of which Balbhaddar Singh died possessed which were acquired by him and did not form part of taluqa Mahewa as it was constituted at the date of the sanad of 1861, and were not lands acquired by him from the Government in exchange for lands which were included in that sanad. The Government had power to give to Balbhaddar Singh in exchange for sanad lands other lands which had not been granted to Girwar Singh in 1861, and the lands so acquired by him in exchange would be subject to the rule of descent prescribed in the sanad of 1861.

By the sanad of 1861 the Government granted to Girwar Singh

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" the full proprietary right, title, and possession of taluqa Mahewa, consisting of the villages as per list attached to the kabuliyat you have executed," subject to the payment of rent and the other conditions in the sanad mentioned. The estate, which was granted to Girwar Singh in 1861, was the same estate which had been granted to Gajraj Singh in 1859 and had been surrendered to the Government by Girwar Singh. Unfortunately neither the kabuliyat which was executed by Girwar Singh in 1861 nor the kabuliyat which was executed by Gajraj Singh in 1859 has been found, but the lands granted in 1861 were lands of which the Government was then in a position to grant " the full proprietary right and title " to Girwar Singh.

When the case was remitted for inquiry to the Court of the Subordinate Judge, that Court reported that of the 166 villages for which Rani Raghubans Kunwar had obtained her decree, which was the subject of the appeal in 1905, there was no controversy as to 108 of them; it was admitted that the 108 villages were taluqdari villages, that is, that they were villages which were included in the sanad of 1861. As to the remaining fifty-eight villages, the Subordinate Judge reported that Sheo Singh was entitled to twenty-seven specified villages, and that Rani Raghubans Kunwar was entitled to thirty one villages, which also were specified in the report. Rani Raghubans Kunwar filed objections to the findings of the Subordinate Judge as to nineteen of the twenty-seven villages which the Subordinate Judge had reported to the taluqdari villages, and on the other side objections were filed as to the findings of the Subordinate Judge as to the thirty-one villages which he had reported to be non-taluqdari villages, that is, villages not covered by the sanad of 1861.

On the consideration of the report the Court of the Judicial Commissioner allowed the objections of Rani Raghubans Kunwar to the findings of the Subordinate Judge as to Chak Sarkhanpur, Chak Simri, and one-half of Hasnapur, and held that they were non-taluqdari; and, on the other hand, allowed the objections to the findings of the Subordinate Judge as to Sarkhanpur Marhuna, Puraina, and Patti Bhupatpur, and held that they were taluqdari villages, and overruled all the other objections, and made the decree of March 4, 1907, which is one of the decrees now under appeal.

Their Lordships will now deal with the appeals in which the title

to the villages is disputed before them. They will consider only those cases in which it appears from the record that the objections to the report of the Subordinate Judge which had been filed were persisted in by one or other of the parties in the Court of the Judicial Commissioner. It must be taken that the findings of the Subordinate Judge were correct in all those cases in which the objections to his findings were not supported in the Court of the Judicial Commissioner.

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The villages Parai, Unchgaon, and Khandwa Mitmau, which were non-taluqdari villages, and were not included in the sanad of 1861, are villages which the Government subsequently transferred to Balbaddar Singh in exchange for three of the taluqdari sanad villages or parts of them, and consequently must be treated as taluqdari villages which on Balbaddar Singh's death descended to Sheo Singh.

The village Sarkhanpur Marhuna, which is distinct from Chak Sarkhanpur, must be taken to have been a taluqdari village at the time when the sanad of 1861 was granted, and to have been included in that sanad. It descended on Balbaddar Singh's death to Sheo Singh. The pleader for Rani Raghubans Kunwar gave up on her behalf all claim to the village.

Puraina was entered in the summary settlement of 1859 in the name of Janki Pershad as the proprietor. It had been mortgaged to Thakur Umrao Singh, under a mortgage with possession of 1245 Fasli (1837-1838), which became irredeemable by reason of Act XIII. of 1866, and the Settlement Officer on June 30, 1868, gave Balbaddar Singh, who was the legal representative of Thakur Umrao Singh, a decree for the full proprietary possession, Puraina was non-taluqdari property at the time of the sanad of 1861.

Patti Bhupatpur was entered in the summary settlement in the names of Jangu and Lachman as the proprietors. Balbaddar Singh obtained a decree for one-third of the village on February 7, 1868, under a mortgage of conditional sale which had been granted in 1248 Fasli (1840-1841) by the then proprietors. In an application for partition Balbaddar Singh described Patti Bhupatpur as not comprised in any taluqa, and in 1894 he purchased another one-third of the Patti. It was non-taluqdari, and was not included in the sanad of 1861.

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Munda Nizampur was inherited by Balbhaddar Singh from Anand Kunwar, and could not have been included in the sanad of 1861. It is not taluqdari.

[Their Lordships further found upon the facts that the villages Benipur, Chak Sarkhanpur, Chak Simri, and half of Hasnapur had been purchased by Balbhaddar Singh after 1861 and were consequently non-taluqdari, but that the villages Kasba Kheri, Rechan, Nausar Jogipur, Mukaddarpur, Bastanli, Saharwa, Asawa, Banjargaon, Bhargawan, Jamnaha, Saunkia, Sansarpur, and Kaimahra were included in the sanad of 1861 and passed to the appellant; the judgment continued as follows:]

The result of their Lordships' view as to the villages is that to the list of villages set out in the decree of March 4, 1907, of the Court of the Judicial Commissioner, in respect of which Rani Raghubans Kunwar was entitled to maintain her decree for possession, the villages Puraina and Putti Bhupatpur should be added, and that no village should be struck out of that list.

Their Lordships will now consider the decree of the Court of the Judicial Commissioner of January 21, 1909, which was made on the hearing of the objections which were filed to the report of the Subordinate Judge which dealt with disputes as to a house in Sitapur a house in Lucknow, and the movable property of which Balbhaddar Singh had died possessed.

The house in Sitapur was acquired by Balbhaddar Singh, and never at any time was part of the taluqdari estate which was granted to Girwar Singh by the sanad of 1861. It is non-taluqdari.

The house in the Kaiser Bagh at Lucknow. The right to the possession of this house does not depend upon the sanad of 1861, which was granted to Girwar Singh upon the surrender by him to the Government of the sanad of 1859, which had been granted to Gajraj Singh. The house in the Kaiser Bagh was not included in the sanad of 1861. It is common ground that a house in the Kaiser Bagh was allotted by the Government to Girwar Singh in 1864 or 1865 for his use as the taluqdar of taluka Mahewa. That house was demolished when the Canning College was built, and in place of it another house, the house now in dispute, was allotted by the Government to Balbhaddar Singh for his use as the taluqdar of the taluqa Mahewa. No sanad relating to the house has been produced, nor has it been

proved that any sanad relating to the house was granted. But it may be inferred from the fact that the house was allotted to Balbhaddar Singh for his use as taluqdar of Mahewa that such right to possession of it as he had passed not to his widow but to his successor in the taluqdari of Mahewa.

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The movable property of which Balbhaddar Singh died possessed was not subject to the limitation of descent which was by the sanad of 1861 prescribed for the villages which were included in that sanad, and passed on his death to his widow, Rani Raghubans Kunwar.

The decree of the Court of the Judicial Commissioner, dated January 21, 1909, should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for the possession of the house at Lucknow.

Thakur Rajindra Bahadur Singh, who was brought upon the record as the representative of his late father, Sheo Singh, died in 1912, and Rani Raghubans Kunwar died in 1910, and their Lordships have been much pressed to advise His Majesty as to who is now entitled to the property other than taluqa Mahewa as it was constituted at the date of the grant of 1861, in respect of which Rani Raghubans Kunwar brought her suit in 1900 in the Court of the Subordinate Judge of Sitapur, but their Lordships are not in a position to tender such advice, and can only advise His Majesty as to the rights of the parties as they existed at the time when the decrees of the Court of the Judicial Commissioner now under appeal were made.

Their Lordships will humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of March 4, 1907, should be varied by adding to the list of villages set forth in that decree the villages Puraina and Patti Bhupatpur, and that the decree of the Court of the Judicial Commissioner of January 21, 1909, should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for possession of the house at Lucknow, and that so varied those decrees should be affirmed as of the dates when they were made respectively by the Court of the Judicial Commissioner, and should have effect accordingly as to the rights of the parties who were concerned at those

primogeniture. The other lands which passed under the will were self-acquisitions of the late raja.

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The appellant's father had been adopted by the late raja in 1873, and the appellant was born in 1876. The late raja died in 1890, having, as above mentioned, made a will in favour of the respondent, who, being then an infant, was placed under the Court of Wards.

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The appellant's father thereupon instituted a suit against the Court of Wards to recover the late raja's estates. He alleged that the will was invalid, and that the respondent, therein referred to as the raja's natural-born son (aurasa), was a supposititious child. The Privy Council in that suit, without deciding the question of parentage, held (affirming the High Court) that the respondent was entitled to succeed under the will. The appeal is reported at L. R. 26 I. A. 83.

In 1907 the appellant instituted the present suit against the respondent claiming maintenance at Rs. 1000 per month with payment of arrears; he prayed that the maintenance should be made a charge upon the estate. By his plaint he did not admit that the respondent was the son of the late raja, but claimed that the estate had been joint family property of himself, his father, and the late raja. The respondent by his written statement altogether denied the claim, and pleaded, in the alternative, that the amount claimed was excessive, and that arrears were not recoverable.

The Subordinate Judge made a decree for maintenance and for payment of arrears. Both parties appealed, the appellant contending that the amount decreed was too small. The High Court (Sankaran Nair and Oldfield JJ.) allowed the present respondent's appeal and dismissed the suit. The grounds of the judgments appear shortly from the judgment of their Lordships. The appeal to the High Court is reported at I. L. R. 39 M. 396.

1918. March 11, 12. *Upjohn, K.C.*, and *Dunne, K.C.*, for the appellant. A right to maintenance was vested in the appellant at the death of the late raja; the devise to the respondent was in law subject to that right. The decisions of the Board prior to *Sartaj Kuari v. Deoraj Kuari* (1) establish the right of the junior

(1) L. R. 15 I. A. 51.

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members of an impartible family to maintenance; they show that the right is of the same character whether the property be partible or impartible: *Naraguntty Lutchmee v. Vengamma Naidoo* (1); *Beer Pertab Sahee v. Rajender Pertab Sahee* (2); *Muttusawmy Jagavera v. Vencataswara* (3); *Katchekaleyana Rungappa v. Katchevijaya Rungappa* (4); *Perisawmi v. Perisawmi*. (5) The judgment of the Board in *Sirtaj Kuuri's Case* (6) expressly recognizes that the right to maintenance is not affected thereby. That judgment shows that it is the loss of the right to partition which gives rise to the right to maintenance; that proposition is supported by *Himmutsing v. Gampatsing* (7), *Ramchandra v. Sakaram* (8), and by Mayne's Hindu Law, 8th ed., pars. 454, 458. Since *Sirtaj Kuuri's Case* (6) the right in the case of an impartible estate has been recognized in *Rio Venkata v. Court of Wards* (9), *Yarlagadda Mallikarjuna v. Yarlagadda Durga* (10), and *Kachi Kaliyana Rengappa v. Kachi Yuva Rengappa*. (11) The right is a right in realty, and is enforceable against the estate in the hands of a devisee: *Golab Koonwur v. Collector of Benares* (12); *Janki v. Naind Ram*. (13) This is illustrated by statutory provisions: Transfer of Property Act (IV. of 1882), s. 39; Hindu Wills Act (XXI. of 1870), s. 3; Probate and Administration Act. (V. of 1831), s. 149.

De Gruyther, K.C., and *Kenworthy Brown*, for the respondent. The appellant makes no claim upon the ground of relationship and alleges no special custom. The right to maintenance arises wholly from the existence of a co-parcenary, save so far as the right is given on personal grounds by express texts of the Mitakshara. The decisions of the Board and the observations in judgments prior to *Sirtaj Kuuri's Case* (6) were based upon the assumption that there was a co-parcenary interest in an impartible estate. [Reference was made to the cases cited for the appellant, also to *Katama Natchiar v. Raja of Sahivagunga*. (14)] That basis is entirely

(1) (1861) 9 Moo. I. A. 66.

(8) (1877) I. L. R. 2 B. 346.

(2) (1867) 12 Moo. I. A. 1.

(9) (1899) I. R. 26 I. A. 83.

(3) (1868) 12 Moo. I. A. 203.

(10) (1900) L. R. 27 I. A. 151.

(4) (1869) 12 Moo. I. A. 495.

(11) (1905) L. R. 32 I. A. 26.

(5) (1878) L. R. 5 I. A. 149.

(12) (1847) 4 Moo. I. A. 246.

(6) L. R. 15 I. A. 51.

(13) (1888) I. L. R. 11 A. 194.

(7) (1875) 12 Bom. H. C. 94, 96, No.

(14) (1863) 9 Moo. I. A. 539, 588.

removed by *Sartaj Kuari's Case* (1) and later cases, such as *Rao Venkata v. Court of Wards*. (2) If the recognition of the right was not based upon a supposed community of interest, it was based upon a tacitly accepted custom. But no judicial recognition has been given to an invariable right by custom save in the case of a son or daughter of a holder : *Nilmony Singh Deo v. Hingoo, Lall Deo*. (3) The present appellant is a grandson of the late raja and alleged no custom. A right to maintenance in every descendant of a holder would be inconsistent with the holder's right to alienate. The proposition in Mayne's Hindu Law, 8th ed., par. 454, to the effect that a son of the holder is entitled to maintenance "as that is the only mode in which he can benefit by the ancestral estate" is founded entirely upon the note to *Himmatsing v. Gampatsing* (4), and is erroneous.

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Upjohn, K.C., replied.

May 2. The judgment of their Lordships was delivered by

LORD DUNEDIN. The plaintiff is the son of an adopted son of the late Raja of Pittapur, and he sues the defendant, the present Raja of Pittapur, for maintenance. At the time that the suit was instituted the father of the plaintiff was alive, but pending the suit he died. The raj of Pittapur is an impartible zamindari, and was devised by will to the defendant, who was described in the will as the aurasa son of the late raja born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the raj, and alleged that he was not the legitimate son of the late raja. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that, in accordance with what had been laid down by this Board in the case of *Sartaj Kuari v. Deoraj Kuari* (1), the zamindari of Pittapur being impartible there was no right in the plaintiff to quarrel with the alienation made by the will of the late raja.

(1) L. R. 15 I. A. 51.

(2) L. R. 26 I. A. 83.

(3) I. L. R. 5 C. 259.

(4) 12 Bom. H. C. 96, n.

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The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular zamindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, namely, that by birth he had a right to maintenance out of the property constituting the raj, which right followed the property into the hands of a third party. The learned judge of the subordinate Court gave judgment in favour of the plaintiff for maintenance and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this : He considered that the zamindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the Mitakshara law exists also in this case. The learned judges of the Court of Appeal held that after the decisions in *Sartaj Kuari v. Deoraj Kuari* (1) and *Rao Venkata v. Court of Wards* (2), it was impossible to base the plaintiff's right to maintenance on any right of co-parcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Sartaj Kuari v. Deoraj Kuari* (1) embodied the theory that there was joint property in an impartible zamindari, which only fell short of co-parcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself : "It must be conceded that the complete rights of ordinary co-parcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—

(1) L. R. 15 I. A. 51.

(2) L. R. 26 I. A. 83.

the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

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But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible zamindari there is no co-parcenary, and consequently no person existed who as co-parcener could object to alienation of the whole subject by the de facto and de jure holder. That judgment was followed and applied to this very raj in the *Pittapur Case*. (1) The import of these decisions was, in their Lordships' view, correctly stated by Sir L. Jenkins in the case of *Bachoo v. Mankorebai* (2): "It has now been definitely decided that in impartible properties there is no co-parcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property; that this co-parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is de facto accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of co-parcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work, "Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that the right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category

(1) L. R. 26 I. A. 83.

(2) (1903) I. L. R. 29 B. 58.

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of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the madman, &c. Such persons are debarred from the rights of co-parcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatized with the personal defect, get by their birth the full status of co-parcenary.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law.

Their Lordships will now revert to the position of an impartible zamindari as it has been fixed by the decisions before referred to. An impartible zamindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without

the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognized that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Sartaj Kuari v. Deoraj Kuari*. (1) For example, in the case of *Yarlagadda Mallikarjuna v. Yarlagadda Durga* (2) the judgment says: "As to the zamindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir." But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh Deo v. Hingoo Lall Singh Deo* (3): "We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right."

Apart from custom, what is left? The matter is tersely put by Sankaran Nair J. in the Court of Appeal: "The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship. . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant : *John Josselyn*.

Solicitor for respondent : *Douglas Grant*.

(1) I. L. R. 15 I. A. 51.

(2) L. R. 26 I. A. 157.

(3) I. L. R. 5 C. 259.

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could validly adopt to her deceased husband ; (3.) that the adoption of the appellant having been to a person other than the last male holder (Brojo), and the estate having upon the death of Brojo vested in a person other than the adoptive mother, the adoption was invalid.

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The facts appear from the judgment of their Lordships.

The District Judge dismissed the suit. He held (1.) that under the terms of the authority to adopt there was not power to make a second adoption ; (2.) that, in any case, the authority had come to an end in that Brojo had left a widow surviving him ; and (3.) that the estate being impartible, the principles governing separate property were applicable rather than those governing an undivided co-parcenary, and that upon the former principles the adoption was invalid.

The High Court affirmed the decree. The learned judges (Sir Arnold White C. J. and Seshagiri Aiyar J.) agreed in holding that under the authority there was power to make a second adoption, but that the power was not exercisable in that Brojo's widow was alive when the second adoption was made. Upon the remaining question involved in the appeal the learned judges were not wholly agreed. The Chief Justice did not desire to dissent from the judgment of Seshagiri Aiyar J., but was not satisfied that the judgment of the District Judge was wrong. Seshagiri Aiyar J. was of opinion that the rule that an estate once vested can only be divested by an adoption when the adoption is to the last male holder was not applicable to co-parcenary property ; and that the rule consequently did not apply, since, in his view, every incident which attached to survivorship existed in the case of an impartible estate in Madras either under the Madras Impartible Estates Act (II. of 1904) or by judicial pronouncements.

The appeal is reported at I. L. R. 39 M. 1105.

1918. March 12. *De Gruyther, K.C.*, and *Dube*, for the appellant. The terms of the authority and the circumstances indicate that the intention was that a second adoption should be made if necessary ; the first adoption therefore did not exhaust the power : *Kannipalli v. Pucha Venkata* (1) ; *Bhagwat Pershad v. Murari*

(1) (1906) L. R. 33 I. A. 145.

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Lall. (1) The existence of Brojo's widow at the date of the adoption did not exclude the valid exercise of the power. Brojo himself was not adopted till after the death of Adikonda; nevertheless the Board in *Ragunadha v. Brozo Kishoro* (2) held that he was entitled to succeed. There is no text to support the limit to the exercise of a power to adopt laid down in *Ramkrishna v. Shamarao*. (3) In any case, that rule does not apply to this case, because it was not proved that Brojo's widow had power to adopt, and because the widow herself took no estate, the family being joint. Nor does the rule that an estate once vested can only be divested by an adoption to the last holder apply, since the appellant took by survivorship. The decision of the Board in *Ragunadha v. Brozo Kishoro* (2) shows that this family is to be treated as joint, subject only to a custom of devolution to a single heir. That decision is not affected by the judgment in *Sartaj Kuari v. Deoraj Kuari*. (4) Further, the plaint alleged that Adikonda took by survivorship, and that fact was not put in issue. The respondent is therefore precluded by Order VIII., r. 5, from denying that the family was joint and that succession in it was by survivorship. Under a valid authority to adopt a new co-parcener can be added at any time : *Bachoo Hurkisondas v. Mankorebai*. (5) The decision of the Board in *Bhoobhun Moyee v. Kishore Acharj* (6) does not apply, because there the family was separate, and the property had vested by inheritance.

Sir Erle Richards, K.C., and *Parikh*, for the respondent, were not called upon.

April 26. The judgment of their Lordships was delivered by

VISCOUNT HAIDANE. This is an appeal from a decree of the High Court of Judicature at Madras which affirmed a decree of the District Judge of Ganjam. The main question to be decided relates to the validity of the appellant's adoption.

The suit is concerned with an impartible zamindari in the district of Ganjam called Chinnakimidi or Pratapgiri. In 1868 the holder of the zamindari was Adikonda Deo, who was a member of a joint

(1) (1910) 15 Cal. W. N. 524.

(2) (1871) L. R. 3 I. A. 154.

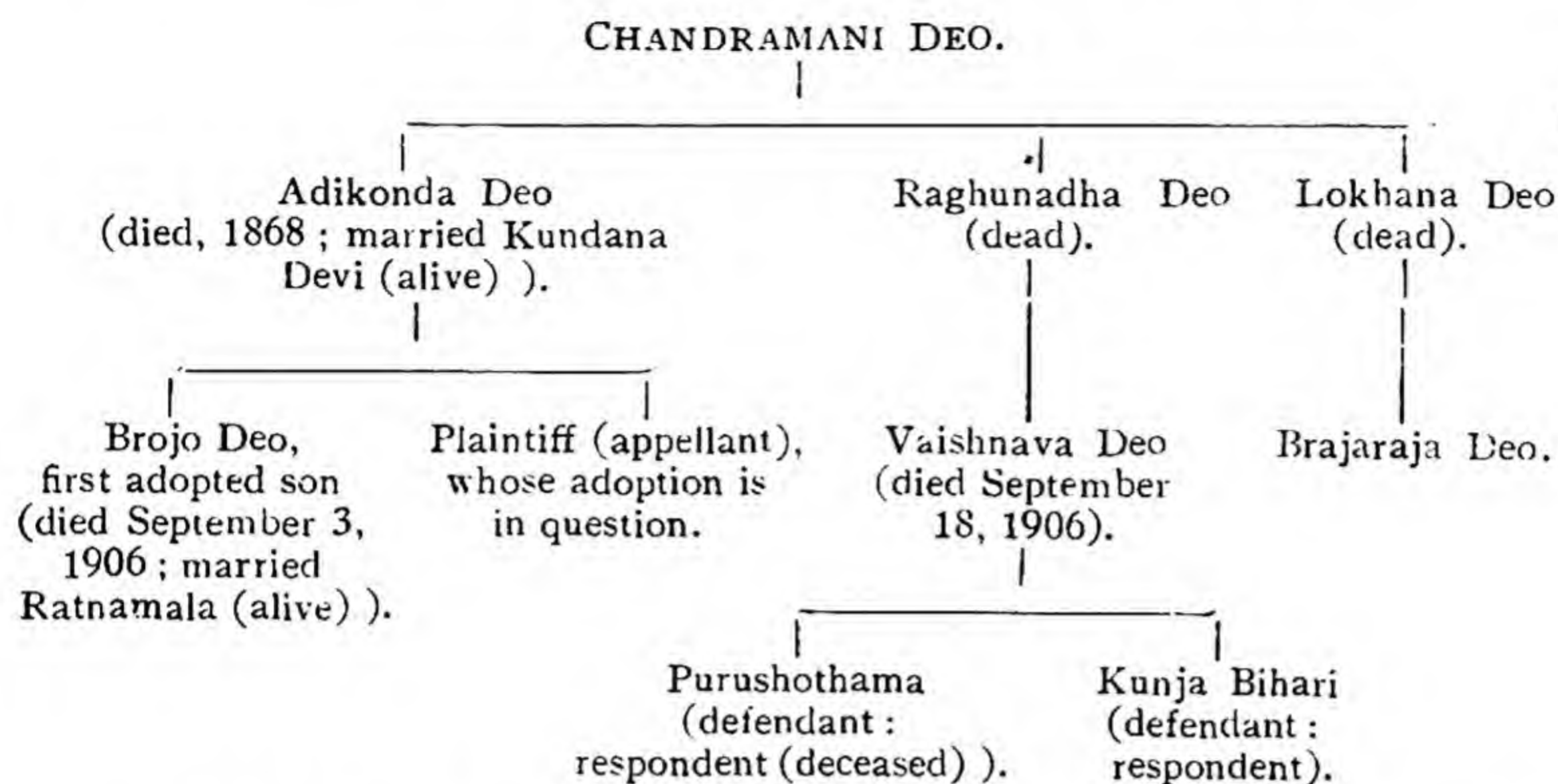
(3) I. L. R. 26 B. 526.

(4) (1887) L. R. 15 I. A. 51.

(5) (1907) L. R. 34 I. A. 107.

(6) (1865) 10 Moo. I. A. 279.

Hindu family subject to the Mitakshara law. The following pedigree shows the relationship of the parties to the suit to each other :—



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Before his death in 1868 Adikonda Deo, the then zamindar, gave to his widow, who was at that time enceinte, a written authority to adopt in the following terms: "As I know that my end, consequent upon the expiration of the terms fixed by fate is approaching, I do hereby declare that in case you, who are at present pregnant, be delivered of a male issue, the said child alone shall inherit my taluk as well as all my property, both movable and immovable. Becoming the owner of movable and immovable properties, till he arrives at the proper age you will look after him; or if a daughter be the result of your present pregnancy, you, adopting a son, who may be in your opinion worthy of the throne, and making him owner of the taluk, &c., shall, pending the attainment of the said boy's majority, take care of him. This agreement is executed with my free will."

On the death of Adikonda, his brother, Raghunadha Deo, took possession of the zamindari. The widow gave birth to a daughter, and, acting on the authority, adopted to her husband, a boy, Brojo Deo, in 1870. The adopted son instituted a suit to recover the zamindari from Raghunadha Deo, and this suit was decided in his favour by this Board in 1876. Having recovered possession of the zamindari, Brojo held it until his death in 1906. He left a widow, Ratnamala, but no son. Possession of the zamindari was then taken by Vaishnava Deo, who died later in the same year, and was succeeded in the possession by the deceased respondent, Purushothama Deo.

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In 1907 the widow of Adikonda Deo purported to make a second adoption to her husband, under the terms of the authority already set out, by adopting the present appellant. The latter, as plaintiff, subsequently instituted the present suit to recover the zamindari.

Several issues were framed, but that on which the result of the appeal must in any view turn is whether the adoption was legal. For if this question be answered in the negative other issues which were raised before the Courts below do not arise, and the root is cut from the appellant's case.

It is not in dispute that the zamindari was impartible and descended by the rule of primogeniture to a single heir. When Brojo was adopted, he succeeded as though he had been the actual son of Adikonda, and, as this Board decided in 1876 with reference to this very succession in a case reported in L. R. 3 I. A. 154, he became entitled to oust Raghunadha, whose right to enter was only temporary, operating merely to prevent the ownership from being in abeyance pending any such succession to his elder brother as the adoption brought about. But when Brojo succeeded he became himself the full owner, from whom heirship must be traced instead of as earlier from Adikonda. The widow of the latter was therefore in a different position when she endeavoured to effect the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband, Adikonda, which related back to his death. On the second occasion the ownership which had become vested in Brojo had intervened, and it was only to his estate that he could possibly establish a succession. The learned judges in the Courts below have all agreed in holding that any authority she could originally be taken to have received to make a second adoption had become inoperative by reason of the changed circumstances, and their Lordships are of opinion that the conclusion so come to was right.

The Hindu law no doubt recognizes the validity of an authority given to a Hindu widow by her deceased husband to make a second, or even a third or fourth, adoption on failure of the previous adoption to attain the object for which the power is given, namely, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. When the authority to make successive

adoptions is alleged, two questions arise : (1.) whether it was in fact given ; and (2.) if so given, did it still exist in the widow when the subsequent adoption is made.

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In the present case their Lordships do not consider it necessary to decide whether the document before them can be construed as by its terms enabling a second adoption to be made. For the vital question here is whether after the adoption of Brojo Deo the power still survived in the widow of Adikonda Deo.

When and under what circumstances the authority ceases to be exercisable has been considered in a number of cases both by this Board and the Courts in India. The High Court at Bombay took the view that the power must be looked on as extinguished under analogous circumstances in the case of *Ramkrishna v. Shamarao* (1), where Chandravarkar J., delivering the judgment of the Full Bench, examines the authorities closely. He interprets earlier decisions of the Judicial Committee as having established conclusively that, quite apart from any question of construction, there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and that when that limit is reached the power is at an end. That limit may arise from circumstances such as those already referred to. The authorities on which he founds are the judgment of this Board as delivered by Lord Kingsdown in *Bhoobhun Moyee v Ram Kishore* (2), and the subsequent judgments in *Pudma Coomari v. Court of Wards* (3) and *Thayammal v. Venkatarama*. (4)

Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned judge, and they are of opinion that, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Brojo, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow. That widow was not a party to the suit, and, whether or not she had power to adopt to Brojo, it has not been established against her that she had no such power. Their Lordships think

(1) I. L. R. 26 B. 526.

(3) (1881) L. R. 8 I. A. 229.

(2) 10 Moo. I. A. 279.

(4) (1887) L. R. 14 I. A. 67.

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it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of Brojo and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last owner and could not adopt a son to him. This conclusion is, in their opinion, in no way in conflict with the previous decision of this Board as to the succession to this zamindari. There the title of Adikonda's widow to displace Raghunadha's succession was recognized. But Raghunadha's succession was of a character only provisional, and subject to defeasance by the emergence of a male heir to Adikonda.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Douglas Grant.*

Solicitors for respondent: *Chapman-Walker & Shephard.*

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 May 30.

MAHARAJA RANJIT SINGH APPELLANT;
 AND
 MAHARAJ BAHADUR SINGH RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation—Chaukidari Chakaran Lands—Transfer to Zamindar—Suit by Patnidar—Village-Chaukidari Act (VI. of 1870, Bengal)—Indian Limitation Act (XV. of 1877), Sched. II., arts. 113, 144.

The respondent was patnidar or darpatnidar of villages under patnis granted by the appellant. Chaukidari chakaran lands situated within the villages having been transferred by Government to the appellant, the respondent sued for declarations that the lands formed part of the several patnis, for settlements of the lands, and possession:—

Held, that the suits were not suits for specific performance of contracts within art. 113 of Sched. II. of the Indian Limitation Act,

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

1877, but suits for possession of immovable property within art. 144; and that the period of limitation accordingly was not three but twelve years.

APPEAL from a judgment and seven decrees of the High Court (March 5, 1913) reversing seven decrees of the District Judge of Birbhum.

The respondent was patnidar or darpatnidar of villages included in seven patni grants from the appellant as zamindar. The Government having resumed possession under Bengal Act VI. of 1870 of chaukidari chakaran lands within the villages, at various dates between December 12, 1896, and March 8, 1899, transferred them under that Act to the appellant. The respondent's right to possession of the lands being denied, he instituted in September, 1904, seven suits against the appellant in the Munsif's Court.

By his plaint in each suit the respondent claimed a declaration that the chaukidari chakaran lands formed parcel of the patni mahal in question and that he was entitled to a settlement, and he further claimed khas possession. The appellant pleaded, inter alia, that the suits were barred by limitation. His contention was that they were not suits for possession of immovable property within art. 144 of Sched. II. of the Indian Limitation Act, 1877, but were suits for the specific performance of contracts within art. 113, and that they were barred under art. 113 since they were not instituted within three years from the dates fixed for performance or from the date when the plaintiff had notice that performance was refused.

The District Judge, on appeals from the Munsif's Court, accepted the above contention and dismissed the suits.

Upon consolidated appeals to the High Court Rampini and Sharfuddin JJ. agreed that art. 113 applied, but remanded the suits for determination of an issue whether the suits were instituted within three years of the respondent attaining his majority. On appeal from the Munsif on remand, the District Judge decided that issue in favour of the appellant in each suit and again dismissed the suits.

Upon a further appeal to the High Court Chitty and Teunon JJ. disagreed with the view previously taken by the Court. They held that art. 113 did not apply and that the suits were governed by

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art. 144, by which the period of limitation was twelve years from the date when possession became adverse. There being on the findings and contentions no other question of law involved, they made decrees as prayed.

1918. April 16. *De Gruyther K.C.* and *O'Gorman* (for *Eddis*, serving with His Majesty's Forces) for the appellant. The suits were for specific performance of contracts and were barred by art. 113. The right of the respondent arose solely out of covenants to be implied in the patnis, and by virtue of s. 51 of Bengal Act VI. of 1870, which provides that the transfer shall be subject to rights of contract : *Ranjit Singh v. Kali Dasi Debi*. (1) The Board in that appeal affirmed the decree of the High Court for possession subject to a fair and reasonable assessment. Until the assessment was made there was no right to possession; the suits cannot therefore be regarded as suits for possession to which art. 144 applies. [Reference was also made to *Hari Narain Mozumdar v. Mukund Lal Mundal*. (2)]

Upjohn K.C. and *Sir William Garth* for the respondent. Art. 113 applies only to a suit to enforce specific performance of a purely personal obligation. Under the patnis the respondent had a real interest in the chaukidari chakaran lands, not merely a right founded on a personal obligation. The word "contract" in s. 51 of Bengal Act VI. of 1870 is used in a wide sense, and includes a right in realty. In *Ranjit Singh v. Kali Dasi Debi* (3) the section is referred to as preserving the rights of third parties in the lands, and the decision was upon that basis. The suits were for possession within art. 144, and the period of limitation was therefore twelve years.

De Gruyther K. C. replied.

May 30. The judgment of their Lordships was delivered by

LORD BUCKMASTER. This is an appeal against seven decrees of the High Court of Calcutta dated March 5, 1913. These decrees were made in seven suits instituted by the respondent on September 10 and 20, 1904, against the appellant and others claiming to

(1) (1917) L. R. 44 I. A. 117.

(2) (1900) 4 Cal. W. N. 114.

(3) L. R. 44 I. A. 117, 125.

recover possession and settlement of certain chaukidari chakaran lands in villages of which the appellant is the zamindar. It is unnecessary to deal with the history and vicissitudes of the litigation, as the only question that now arises for determination is whether the suits were barred by the Indian Limitation Act, 1877. That statute, as is well known, fixed different periods of limitation within which suits of different characters should be brought. The appellant contends that art. 113 of Sched. II. of that statute regulates the rights of the parties in the present case, while the respondent asserts that the period is fixed by art. 144 of the same schedule. By the terms of the schedule, art. 113 is stated to apply to a suit for specific performance of a contract, the period of limitation is fixed at three years, and the time from which the period begins to run is stated to be the date fixed for the performance or, if no such date is fixed, the date when the plaintiff has notice that performance is refused. Art. 144, on the other hand, relates to a suit for possession of immovable property or any interest therein not thereby otherwise specially provided for ; the period is twelve years, and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. If art. 113 applies the appellant is entitled to succeed. But it is admitted that he must fail if art. 144 prescribes the true period.

The circumstances out of which the action arose can be briefly stated. The respondent is the patnidar of half and darpatnidar of the other half of the village of Gopalpur, and is patnidar of six other villages, all of the said villages being within the zamindari of the appellant. Some of the lands in these villages included in the patnis and the darpatnis were originally held as chaukidari chakaran lands, but in June, 1898, these lands were all resumed by the Collector under the Bengal Act VI. of 1870, and then transferred to the appellant. It is unnecessary to state the history of these lands, the circumstances attaching to their tenure, and the respective rights of the parties when they were resumed by the Collector, for all these matters have been fully dealt with in a judgment of this Board in the case of *Ranjit Singh v. Kali Dasi Debi*. (1) It was there decided that upon such resumption and transfer to the zamindar, as is provided by the Bengal Act VI. of 1870, the patnidar

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or the darpatnidar is entitled under s. 51 to possession of the chaukidari chakaran lands. That right depended upon the interpretation given by the Board to s. 51 of Act VI. of 1870. This section operates to transfer the land to the zamindar, "subject to all contracts theretofore made in respect of, under, or by virtue of which any person other than the zamindar may have any right to any land, or portion of his estate or tenure in the place in which such land may be situate."

Lord Parker, in delivering the judgment of the Board, while commenting upon the fact that these words were not happily chosen, expressed the opinion that their obvious intention was to preserve the rights of third parties. He said: "They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the zamindar or those through whom he claims, and that under this contract some third party may have an interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a patnidar under a patni grant by virtue of which the patnidar is lessee of the zamindar's interest in the lands resumed, and also the rights of a darpatnidar under a darpatni grant."

There is, therefore, no longer any question as to the right of the respondent to the lands, but the appellant's contention is that as the rights of the patnidar are reserved under the words referred to they must be assumed to be contractual rights, that consequently a suit to enforce those rights must be a suit for specific performance, and that the date from which the statute begins to run must be the date of the grants to the zamindar. Their Lordships are unable to accede to that contention. It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of s. 51 they are therefore rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the patni grants were made the resumption of the chaukidari chakaran lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession. Upon resumption of such possession the rights of the patnidar were

those conferred on him by the estate and interest created by the patni leases, and it was these rights that were kept alive by s. 51 of Act VI. of 1870 of the Bengal Council. It is only necessary to examine the words which prescribe the date from which the period begins to run in art. 113 of Sched. II. of the Limitation Act to show the difficulties in the way of any contrary contention. This date, as has already been pointed out, is either the date fixed for performance or the date when the plaintiff has notice that performance has been refused, but no date whatever has been fixed for performance in such a case as the present, either by the original grant or by the terms of the statute, nor has there been any refusal to perform a contract, for there was no unexecuted contract which had to be performed. A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word "contract" itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word was used in s. 51, and the rights thereby reserved to the patnidars, comprehensively included in the word "contracts," are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, and it is this which, in their Lordships' opinion, is the character of the suits in the present case.

From this it follows the period of limitation is that fixed by art. 144; consequently the judgment appealed from is in their Lordships' opinion correct, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Downer & Johnson.*

Solicitor for respondent : *G. C. Farr.*

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June 3.

CHAUDHRI RISAL SINGH AND ANOTHER . APPELLANTS ;

AND

BALWANT SINGH AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Widow's Estate—Reversioner—Decree by Estoppel against Widow—Trial on Merits in Privy Council—Reversioner bound—Res judicata.

When the estate of a deceased Hindu has vested in a female heir for her life, a decree fairly and properly obtained against her, after a trial upon the merits, is binding upon the reversionary heirs, although the female heir was personally estopped from denying the material facts.

A Hindu female, in whom an estate vested upon the death of her husband and infant son, instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid. Both Courts in India held that she was estopped by her conduct from denying the validity of the adoption, and the suit was dismissed on that ground. Upon appeal to the Privy Council the decree was affirmed upon the ground of estoppel, and the Board further held upon the facts that the adoption was valid. Upon the death of the widow the first appellant sued as reversionary heir, alleging that the adoption was invalid. It appearing that upon the previous appeal to the Board there had been a fair trial of the right upon the merits:—

Held, that the reversionary heir was bound by the decision as res judicata.

APPEAL from a judgment and decree of the High Court (April 29, 1915) affirming a decree of the Subordinate Judge of Saharanpur.

The suit was instituted by the appellants against the respondents for possession of immovable property known as the Landhaura Estate. By the plaint the first appellant claimed that he was entitled to succeed to the property as reversionary heir of Raja Jagat Prakash Singh ; it was alleged that Rani Dharam Kunwar, the mother of the said deceased Raja, had no authority from her husband to adopt the first respondent ; and that the adoption was invalid by Hindu law. The respondents pleaded that the Rani had authority to make the adoption, and that the adoption was valid ;

* *Present*: LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

further, that the question of the validity of the adoption was res judicata, in that it had been decided by the Privy Council in favour of Balwant Singh in a suit brought by the Rani at a time when she represented the estate.

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The decision of the Privy Council referred to is reported at L. R. 39 I. A. 142.

The facts appear from the judgment of their Lordships.

The Subordinate Judge framed several issues, of which two only are material to this report, namely: (1.) Are the plaintiffs bound by the decision of their Lordships of the Privy Council? (7.) Was the defendant No. 1 (Balwant Singh) validly adopted to Raja Raghubir with his permission?

In the previous suit, in addition to issues directed to the question of estoppel against the Rani, the following issue was settled: (3.) Had or had not the plaintiff (the Rani) any authority from her husband to adopt the defendant (Balwant Singh)? Both Courts in India decided in that suit upon the estoppel without recording any finding upon that issue. The facts as to the proceedings upon the appeal to the Privy Council appear from the report at L. R. 39 I. A. 142 and the present judgment of their Lordships.

The Subordinate Judge held in the present suit that the appellants were bound by the previous decision of the Privy Council; he accordingly considered that it was unnecessary to deal with issue No. 7, and dismissed the suit.

Upon appeal to the High Court, the learned judges, Sir Henry Richards C.J. and Sir P. C. Banerji J., differed. The Chief Justice was of opinion that the matter was not res judicata against the appellants because the trial judge in the former suit had excluded certain verbal evidence upon the issue as to authority, though he had recorded the documentary evidence thereon. Banerji J. agreed with the Subordinate Judge that, the Judicial Committee having considered the evidence upon the record as sufficient to enable them to decide the question of fact, the decision was binding. The matter was referred under s. 98 of the Civil Procedure Code, 1908, to a third judge, Chamier J., who, upon a consideration of the former proceedings before the Board and their Lordships' judgment, agreed with the view of Banerji J.

The appeal was accordingly dismissed.

J. C. 1918. May 3, 6, 7, 9. *Dunne K.C.* and *W. L. Richards* for the appellants. In the former suit the Rani was estopped by her acts from denying that she had authority to adopt Balwant Singh; she consequently could not represent the estate upon that issue within the principle laid down in *Katama Natchiar v. Raja of Shivagunga*.⁽¹⁾ That principle has never been applied where the female holder was estopped by facts personal to herself; it applies only where there has been a "fair trial of the right." That has not been the case here. Both Courts in India decided the former suit purely upon the ground of estoppel, and the trial judge excluded evidence as to the authority to adopt. Having regard to the exclusion of evidence, it is to be inferred that the Board did not intend to give a judicial decision binding upon the reversioners. The appellants not having been parties to the previous suit, s. 11 of the Code of Civil Procedure, 1908, does not apply, the sole question being whether the appellants are bound under the rule laid down in the case above referred to. So far as English decisions apply, they support the view that there was no res judicata: *Concha v. Concha* (2); *Langmead v. Maple* (3) *Robinson v. Duleep Singh*.⁽⁴⁾

De Gruyther K.C. and *Parikh* for the respondents. The widow represented the estate, and the appellants are bound by the previous decision of the Board upon the principle laid down in *Katama Natchiar v. Raja of Shivagunga* (1), which was followed and applied in *Jugol Kishore v. Jotindra Mohun Tagore* (5), *Partab Narain v. Trilokinath* (6), and *Harrinath Chatterji v. Muthoor Mohun*. (7) There was within the rule there laid down a "fair trial of the right." It does not appear from the record that any evidence actually tendered was rejected. It was for the Board to determine whether the material evidence was before it. Further, s. 11 of the Code of Civil Procedure applies, since the effect of the above decisions is that the reversioners are to be regarded as being parties to the suit although they do not claim through the widow: *Chiruvolu Punnamma v. Chiruvolu Perrazu* (8); *Venkatanarayana v. Sub-*

(1) (1863) 9 Moo. I. A. 539, 604.

(2) (1886) 11 App. Cas. 541, 549.

(3) (1865) 18 C. B. (N. S.) 255, 270, 271.

(4) (1878) 11 Ch. D. 798, 813.

(5) (1884) L. R. 11 I. A. 66.

(6) (1884) L. R. 11 I. A. 197.

(7) (1893) L. R. 20 I. A. 183.

(8) (1906) I. L. R. 29 M. 390.

bammal. (1) Under s. 11 the question is whether the same issue was finally decided in a former suit, not whether the cause of action is the same: *Tirbhuban v. Rameshar*. (2) Here in the former suit an issue was settled as to whether the Rani had authority to adopt Balwant Singh. That issue was finally decided by the Board ; it is not material that it was not decided by the Courts in India. [Reference was also made to *Jagatjit Singh v. Sarabjit Singh* (3), *Ashgar Ali Khan v. Ganesh Dass* (4), and, as to successive adoption, to *Kannepalli v. Pucha Venkata*.(5)]

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Dunne K.C. in reply. Sect. 11 does not apply. The whole basis of the rule as to reversioners being bound rests upon the consideration that the widow represented the estate. In this case, having regard to the estoppel, the Rani could not represent the estate. In her plaint in the former suit she asked merely that the adoption be declared not binding upon her. Further, it appears that evidence was excluded, as the record in the former suit shows that that was made a ground of appeal and a ground for the application for leave to apply to the Privy Council.

June 3. The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated April 29, 1915, of the High Court at Allahabad, which affirmed a decree of the Additional Subordinate Judge of Saharanpur by which the suit of the plaintiffs had been dismissed. The suit was dismissed on the ground that a decision of the Board on April 23, 1912, in an appeal to His Majesty in Council in a previous suit, in which Balwant Singh, the principal defendant in this suit, was the defendant, and the late Rani Dharam Kunwar was the plaintiff, operated as a bar to the maintenance of this suit, which is brought by plaintiffs who were not parties to the previous suit, and do not represent either party to the previous suit. That decision is reported at L. R. 39 I. A. 142.

In this suit the plaintiffs are Chaudhri Risal Singh and Fateh Chand. The plaintiff Chaudhri Risal Singh claims possession of

(1) (1915) I. L. R. 42 I. A. 125.

(2) (1906) L. R. 33 I. A. 156.

164.

(3) (1891) L. R. 18 I. A. 165,

176.

(4) (1917) L. R. 44 I. A. 213.

(5) (1906) L. R. 33 I. A. 145.

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part of the Landhaura Raj, which is a large estate of great value ; his claim is based on an allegation that he is the heir of Raja Jagat Prakash Singh, whom he alleges to have been the last male owner of the estate. The other plaintiff, Fateh Chand, alleges that before suit Chaudhri Risal Singh conveyed to him the other part of the estate, and he claims possession of that other part as the grantee of Chaudhri Risal Singh. The plaintiffs also claim mesne profits.

The principal defendant is Balwant Singh, through whom the other defendants claim title. Balwant Singh's case is that the estate vested in him as the adopted son of the late Raja Raghubir Singh, to whom he alleges that he was validly adopted by the late Rani Dharam Kunwar, the widow of Raja Raghubir Singh, who admittedly died possessed of the estate. The factum of the adoption was denied by the plaintiffs, but it is no longer disputed, and cannot now be disputed ; the plaintiffs, however, allege that Rani Dharam Kunwar had no authority to adopt a son to her husband, and further that, if she had, the authority was a limited authority, and was exhausted by previous adoptions made by her before she went through the form of adopting Balwant Singh. The decision of the Board, which has been held by the Courts below to operate as a bar to the maintenance of this suit, related to the adoption of Balwant Singh as a son to her late husband by Rani Dharam Kunwar.

The plaintiffs allege and the defendants deny that on the death of Rani Dharam Kunwar on November 12, 1912, the plaintiff Chaudhri Risal Singh was the next nearest reversioner, and was as such entitled to the estate of Landhaura. That issue as to the status of Chaudhri Risal Singh has not been tried, and is irrelevant if the suit is barred by the decision of the Board of April 23, 1912.

There has been much litigation relating to the title to the estate of which Raja Raghubir Singh died possessed, and in order to understand the case which was before the Board in 1912 it is necessary briefly to refer to that previous litigation and to the position of the several parties to it. Raja Raghubir Singh died on April 23, 1868, and at the time of his death he left no son living ; his widow, Rani Dharam Kunwar, was then enceinte, and after his death she, on December 16, 1868, gave birth to Raja Jagat Prakash Singh, who was his posthumous child. Raja Jagat Prakash Singh died in childhood on August 31, 1870, and on his death Rani Dharam Kunwar

succeeded to the possession of the family property in right of her interest for life in it as his mother and heiress. The fact that she alleged that she obtained title to the property under an oral will of her husband, Raghubir Singh, is immaterial. On March 4, 1877, Rani Dharam Kunwar adopted Tofa Singh as a son to Raja Raghubir Singh. Tofa Singh, then known as Raja Narendra Singh, died in childhood about two and a half years after his adoption. On January 20, 1883, Rani Dharam Kunwar adopted another boy, named Ram Sarup, as a son to Raja Raghubir Singh. Ram Sarup, then known as Ram Padab Singh, died in June, 1885. On January 13, 1899, Rani Dharam Kunwar adopted Balwant Singh, the principal defendant in this suit, as a son to Raja Raghubir Singh. On January 13, 1899, Chaudhri Ram Niwaz, who was the father of Balwant Singh, executed a deed, by which he acknowledged that he had given his son, Balwant Singh, then sixteen years old, to Rani Dharam Kunwar, widow of Raja Raghubir Singh, deceased, Rais of Landhaura, as an adopted son for her and her husband, and stated that "the usual religious ceremonies and those connected with the biradri have been performed with all publicity to-day. From to-day the said son has no connection left with his natural family. From to-day the said son will have those rights in the whole of the property left by Raja Raghubir Singh, deceased, and possessed by the said Rani, which an adopted son legally acquires. But it has been agreed between me, the executant and the said Rani, according to the provisions of the will and permission of Raja Raghubir Singh, deceased, that she shall, till the end of her life, continue to be the owner and possessor of the whole estate and property of every description belonging to the said Raja which exists at present or may be acquired in future; and as long as she lives all sorts of management and supervision of the estate shall rest with her as its owner."

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On May 1, 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghubir Singh, brought a suit in the Court of the Subordinate Judge of Saharanpur against Rani Dharam Kunwar and Balwant Singh to have the adoption of Balwant Singh set aside. In that suit evidence as to the alleged adoption was taken. The main contention of Baldeo Singh, so far as the adoption of Balwant Singh was concerned, was that Raja Raghubir Singh had

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not given to Rani Dharam Kunwar authority to adopt a son to him, and that any authority which Raja Raghubir Singh might have given was not an authority which enabled her to make successive adoptions. No oral evidence to prove that an authority to adopt had not been given to Rani Dharam Kunwar by Raja Raghubir Singh was apparently procurable; in that suit Rani Dharam Kunwar did not give evidence, but in her written statement she alleged that she had "under valid authority and after due proclamation adopted Balwant Singh, defendant No. 2, and the aforesaid adoption is every way proper." Her pleader in that suit stated to the Court that the authority to adopt was oral, and as to the nature and scope of her authority to adopt, said that Raja Raghubir Singh's object in giving his wife authority to adopt was that "in the event of Rani Dharam Kunwar, who was then pregnant, giving birth to a daughter, or of a son being born and dying, she should adopt, and in the event of the death of that adopted son, she should again adopt, and in the event of the last-named also dying, she had authority to adopt again, and so on." There was documentary evidence put before the Subordinate Judge, and four witnesses were called to prove the oral authority to adopt, but the Subordinate Judge did not believe those witnesses, and he found that Rani Dharam Kunwar had not authority to adopt Balwant Singh, as the authority was not one authorising her to make successive adoptions. Having found, however, that Baldeo Singh had failed to prove that he was a reversioner, the Subordinate Judge dismissed the suit, but in his decree he inserted his finding against the validity of the adoption. That decree came on appeal before the High Court at Allahabad, and the appeal was dismissed; but the High Court, on the application of Balwant Singh, struck out of the decree of the Subordinate Judge his finding as to the invalidity of the adoption on the ground that, Baldeo Singh having failed to prove that he was a reversioner, the issue as to authority to adopt did not arise and was irrelevant. That application was resisted by Rani Dharam Kunwar, and her advocate frankly informed the High Court that her object in wishing to have the finding as to the invalidity of the adoption retained in the decree of the Subordinate Judge was that it might be used as *res judicata* in future litigation between her and Balwant Singh.

Before Baldeo Singh's suit was dismissed Rani Dharam Kunwar and Balwant Singh had quarrelled. Balwant Singh was claiming his full rights as an adopted son and was refusing to be bound by the terms as to Rani Dharam Kunwar's position with regard to the ownership, management, and control of the property that had come from Raja Raghubir Singh, which had been agreed to by Chaudhri Ram Niwaz in the deed of January 13, 1899, and she determined to repudiate the adoption.

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On January 7, 1905, Rani Dharam Kunwar brought a suit against Balwant Singh in the Court of the Subordinate Judge of Saharanpur, and in her plaint alleged that Raja Raghubir Singh had never given her authority to adopt a son, and prayed that it might be declared that she had no power to adopt Balwant Singh and had in fact never adopted him according to any ceremony under the Hindu law, and that a document of January 13, 1899, in her name as the executant which purported to be a deed of adoption in favour of Balwant Singh was void and ineffectual as against her.

The deed of adoption of January 13, 1899, which Rani Dharam Kunwar sought to have declared void was a registered deed in her name and under her seal in which she alleged that Raja Raghubir Singh when he became hopeless of recovery in his last illness made the following will in her favour, she being then pregnant: "If (God forbid!) you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some boy to me, so that he might perform my stradh ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid!) the son who might be adopted under this authority should die in your lifetime you will have power to adopt another boy."

In that deed Rani Dharam Kunwar, amongst several other things, also alleged that she on the day on which the deed bears date, after performing the necessary ceremonies, adopted Balwant Singh, son of Chaudhri Ram Niwaz, to herself and her husband in the presence of the gentry, the district authorities, and other European gentlemen, and the members of her biradri; and that Chaudri Ram Niwaz gave Balwant Singh to her as an adopted son. That deed was on January 19, 1899, duly registered by the Sub-Registrar

ADVOCATE

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of Rurki, Rani Dharam Kunwar having first personally admitted in the presence of the Sub-Registrar its execution by her. In her plaint in her suit against Balwant Singh she endeavoured to explain away that deed by alleging that she had no knowledge of it before July, 1904; that she had not got it registered; that it was written in her name without her knowledge on January 13, 1899, by one Tahauwar Ali, who was her diwan in charge of her entire business, and was her adviser, and that he had got it registered. She also alleged in her plaint that having learnt during the pendency of Baldeo Singh's suit that Tahauwar Ali was secretly in collusion with Balwant Singh she dismissed him, and she also endeavoured to explain away her written statement in the suit of Baldeo Singh, admitting the adoption of Balwant Singh, and her pleader's statement in that suit as to her authority to make an adoption, by denying that her written statement and her pleader's statement had been authorized by her.

In the suit of Rani Dharam Kunwar against Balwant Singh he in his written statement, amongst other things, alleged that Rani Dharam Kunwar had authority to adopt him to Raja Raghubir Singh and that he had been validly adopted. The Subordinate Judge held that Rani Dharam Kunwar was by her acts estopped from denying that Balwant Singh had been validly adopted to Raja Raghubir Singh, and did not try any other issue. The High Court at Allahabad, agreeing with the Subordinate Judge, dismissed the appeal of Rani Dharam Kunwar, and thereupon she appealed to His Majesty in Council and again failed. The facts which this Board has stated as to the history of the litigation and as to the positions of the parties and their acts have been derived from the record of the appeal to His Majesty in Council in which the Board gave its decision of April 23, 1912. The evidence upon which that decision was arrived at was before the Board in the record of that appeal. It is said that evidence to show that Rani Dharam Kunwar had no authority to adopt Balwant Singh had been excluded in her suit, and that consequently the Board in 1912 ought not to have found that Balwant Singh had been validly adopted. It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken, but it does not appear that she ever applied to have witnesses summoned or tendered any evidence which was rejected. It is difficult to conceive what oral evidence

Rani Dharam Kunwar could have produced, except her own personal evidence, to prove that she had received from Raja Raghubir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption such evidence, having regard to her own acts and documentary evidence on the record, could not have been accepted as true.

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Their Lordships in this appeal pressed the learned counsel who appeared for the appellants to state what oral evidence there was available to prove or to suggest that Raja Raghubir Singh had not in his final illness given to Rani Dharam Kunwar his authority to adopt, but the learned counsel was not in a position to suggest what oral evidence could have been produced. The Board in 1912 was satisfied, and rightly satisfied, that no further evidence as to the authority or absence of authority to adopt could be expected to be produced by any body beyond the evidence then already taken. As appears from the report of the case in *Allahabad Law Journal Reports*, vol. 9, p. 730, the learned counsel for Rani Dharam Kunwar contended in argument before the Board in 1912 that if it were held that Rani Dharam Kunwar was not estopped from denying that Balwant Singh had been validly adopted, the question arose whether she had any authority to adopt him; and further contended that such authority as she alleged would not extend to the adoption in question. There was ample material in the appeal record before the Board in 1912 upon which the Board might find that Raja Raghubir Singh had given authority to Rani Dharam Kunwar to adopt a son to him, and that such authority was a general authority and was not limited to making one or more successive adoptions.

It is clear that the Board in 1912 did intend to decide the question of authority to adopt as a question of fact. In the judgment of the Board it is said: "The third question, viz., as to whether the Rani had authority from her husband to adopt the defendant gives rise to the point which has been argued before their Lordships." And then their Lordships dealt with the contentions on that subject, and found that Raja Raghubir Singh had given to Rani Dharam Kunwar a general power to adopt which justified her adoption of Balwant Singh, and said: "Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to

J. C. the doctrine of estoppel. In their view she was speaking the truth
1918 in Baldeo Singh's action when pleading as to her authority."

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It is clear that the reasons of the Board in 1912 for deciding thus as to the facts and for not confining the decision to the question of the estoppel were to quiet any religious scruples, which might have arisen if Raja Raghubir Singh could be said to have a son only by estoppel to perform religious duties, and also to put a stop to further litigation as to the validity of the adoption of Balwant Singh.

There can be no doubt, in their Lordships' opinion, that Rani Dharam Kunwar in her suit against Balwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchiar v. Raja of Shivagunga*. (1) The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Banerji J. in his judgment in this case thus : " Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir." It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Balwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh. It is true, as was pointed out in a judgment of the High Court in this suit, that the rule of res judicata, as enacted in s. 11 of the Code of Civil Procedure, 1908, is not strictly applicable in this case, as the plaintiffs were not parties to the suit of Rani Dharam Kunwar against Balwant Singh, and do not claim under a party to that suit, but the principle of res judicata has been applied rightly by the Courts in India so as to bind reversioners by decisions in litigation, fairly and honestly conducted, given for or against Hindu females who represented estates, as Rani Dharam Kunwar did in her suit against Balwant Singh.

It has been urged by the learned counsel for the appellants here that Rani Dharam Kunwar cannot be regarded as having represented the estate in her suit against Balwant Singh, as by her acts

(1) 9 Moo. I. A. 539

she was personally estopped from denying that she had validly adopted him to Raja Raghubir Singh. In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitor for respondents : *E. Dalgado.*

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NARAYAN GANESH GHATATE . . . APPELLANT;
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J. C.*
1918
May 9.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Central Provinces Tenancy Act (XI. of 1898), s. 45, sub-ss. 1, 6—Sir Land—Mortgage before Act—Conciliation Award after Act—Mortgagor's Occupancy Right.

The Central Provinces Tenancy Act (XI. of 1898), as amended by Act XXI. of 1899, provides: "Sect. 45. (1.) Notwithstanding any agreement to the contrary . . . a proprietor who, after the commencement of this Act, temporarily or permanently loses (whether under decree or order of a civil Court or a Revenue officer or otherwise) or transfers his rights to occupy sir land as a proprietor, shall at the date of such loss or transfer become an occupancy tenant of that sir land . . . (6.) Nothing in this section shall affect a document duly registered before the commencement of this Act; and, on any surrender or transfer such as is described in sub-section (1.) being made, decreed or ordered in pursuance of such a document, the rights of the parties to occupy the sir land shall accrue as if this Act had not been passed. Explanation:—For the purposes of this section a transfer includes a mortgage and a lease."

* *Present*: LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

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In July, 1901, a foreclosure decree absolute was made under two registered mortgages, made in 1881 and 1884, of fifteen villages including sir lands. Upon appeal the decree was set aside on terms and the matter referred by agreement to a Conciliation Board, which awarded that certain payments should be made by the mortgagors, and that in default seven of the villages should be foreclosed. The mortgagors having made default, a foreclosure decree absolute was made in 1910 in respect of the seven villages. The mortgagees claimed that under the decree they were entitled to actual possession of the sir lands:—

Held, that the conciliation award of 1905 was, for the purposes of the case, a fresh origin of rights between the parties, that s. 45, sub-s. 6, consequently did not apply, and that under s. 45, sub-s. 1, the mortgagors had occupancy rights in the sir lands of the seven villages.

APPEAL from a judgment and decree of the Court of the Judicial Commissioners (May 8, 1911) affirming an order of the District Judge of Bhandara.

By mortgage deeds executed in 1881 and 1884 as security for loans, mortgagors, represented in the appeal by the respondents, mortgaged to mortgagees, represented by the appellant, fifteen villages in the Central Provinces together with all rights.

In 1898 a suit for foreclosure of the mortgages was instituted. The mortgagors contended, *inter alia*, that the mortgagees were not entitled to possession of the sir and khudkasht lands attached to the villages as the right to cultivate them was not mortgaged, and an issue was settled upon that question. The Civil Judge determined all the issues in favour of the mortgagees and, on June 30, 1899, made a decree ordering the mortgagors to pay on or before December 30, 1899, Rs. 86,106 as principal and interest due, and that in default they should be debarred from redeeming. The decree gave particulars of the mortgaged premises, in which particulars were included the sir and khudkasht lands. The mortgagors appealed, claiming ex-proprietary rights in the sir lands, but their appeal was dismissed. The mortgagors having failed to pay, an order absolute for foreclosure was made. Upon appeal that order was set aside upon terms, and the matter was referred by agreement to a Conciliation Board, presided over by a Revenue officer, for arbitration.

On February 23, 1905, an arbitration award was made whereby

the mortgagors, in settlement of their liability under the mortgages to December 30, 1902, were to pay Rs. 13,750 by instalments, and it was provided that in default of payment there should be a foreclosure as to seven of the villages. Clause 7 of the award provided : "The creditor has the same lien on the property mortgaged as he had before conciliation, by virtue of the mortgage deed. In case of default in paying the instalments the terms of the mortgage shall be enforced in respect of the amount awarded." A decree was passed that the award be filed under s. 525 of the Civil Procedure Code, 1882.

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The respondents as mortgagors having failed to make the payments provided by the award, the mortgagees, on June 16, 1910, obtained a decree absolute for foreclosure of the seven villages. Warrants for possession were issued, but as they contained no express mention of the sir and khudkasht lands the mortgagees applied to the Court claiming that they were entitled to possession of those lands.

The District Judge rejected the application. An appeal by the present appellant, representing the mortgagees, was dismissed by the Court of the Judicial Commissioners for reasons which appear from their Lordships' judgment.

1918. May 9. *De Gruyther, K. C.* and *Parikh* for the appellant, The appellant is entitled to possession of the sir lands of the seven villages. The award merely provided the extent to which the rights under the mortgages of 1831 and 1834 should be exercised; only a mortgage could be the subject of a foreclosure. The award and the decree of 1910 were made "in pursuance of" the mortgages within the meaning of s. 45, sub-s. 6, of the Central Provinces Tenancy Act, 1898 ; s. 45, sub-s. 1, consequently does not apply. The award by clause 7 preserved the rights of the parties as they existed under the mortgage save as to the amount recoverable.

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD SUMNER. This is an appeal against a judgment of the Court of the Judicial Commissioner of the Central Provinces, which affirmed an order of the District Judge made in execution proceedings

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on a foreclosure decrec. The point has been very clearly argued, but their Lordships do not think it necessary to take time to consider the matter further.

The history of the case, which is rather complicated, is set out chronologically and very conveniently in the judgment appealed against. The point for decision is one dependent on the construction of s. 45 of the Central Provinces Tenancy Act, 1898, chapter IV., "Of Occupancy-Tenants," and particularly sub-s. 6 of that section.

The substance of the decision of the Court below was that the conciliation award of February, 1905, was, for the purposes of this case, a fresh origin of the rights between the parties, and that, although it came into existence in consequence of the mortgages of 1881 and 1884, and transactions thereunder, it was, both for the purpose of enforcement and for the purpose of the application of this particular section, the transaction between the parties which was the foundation of their rights. Accordingly they concluded that the transfer made or decreed by the proceedings under review could not be said to be in pursuance of the mortgages of 1881 and 1884 which, as documents expressly providing for the transfer of the right to occupy sir land as a proprietor within sub-s. 6, would have been saved from the operation of sub-s. 1, but that in truth sub-s. 1 of s. 45 must be applied, and that therefore, in spite of the terms of the award, which in virtue of the agreement of reference became the agreement of the parties, the mortgagors could not so transfer their right to occupy sir land as to divest themselves of their right as occupancy tenants under the Act.

The reasons, their Lordships think, are sufficiently and fully given in the judgment appealed against and do not require repetition. It is a question of construction, not incapable of being argued and even decided either way, but their Lordships see no reason to differ from the decision appealed against, and will humbly advise His Majesty that the appeal be dismissed, but without costs, as the respondents have not appeared.

Solicitor for appellant : *E. Dalgarno.*

NAFAR CHANDRA PAL APPELLANT ;
 AND
 SHUKUR AND OTHERS RESPONDENTS.

J. C.*
 1918
June 4.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Procedure—Appeal to High Court—Jurisdiction—Record of Rights—Standard of Measurement—Code of Civil Procedure (XIV. of 1882), s. 584—Bengal Tenancy Act (VIII. of 1885), s. 109-A, sub-s. 3.

The right of appeal to the High Court given by s. 109-A, sub-s. 3, of the Bengal Tenancy Act, 1885, is subject to s. 584 of the Code of Civil Procedure, 1882, and can only be exercised upon the grounds therein mentioned. The High Court has, therefore, no jurisdiction under the sub-section to set aside the decree of a District Judge upon the ground that he had applied the wrong standard of measurement to land of which the rent was in question.

APPEAL by special leave from a judgment and fourteen decrees of the High Court (February 4, 1910) reversing decrees of the District Judge of Nadia.

The question for determination was whether the High Court, in allowing an appeal under s. 109-A, sub-s. 3, of the Bengal Tenancy Act, 1885, had acted without jurisdiction in that it had decided the appeal upon a ground not open for it to consider.

The material facts and the terms of the relevant statutory provisions appear from the judgment of their Lordships.

1918. April 19. *Dunne, K.C.* for the appellant. The only ground of the decision, namely that the finding of the District Judge as to the standard of measurement applicable was wrong, was a question of fact. The right of appeal under s. 109-A, sub-s. 3, of the Bengal Tenancy Act, 1885, was subject to s. 584 of the Code of Civil Procedure, 1882; the High Court, therefore, had no jurisdiction to entertain the appeal upon a question of fact: *Durga Choudhrain v. Jawahir Singh*(1); *Ravi Veeraraghavulu v. Bomma Devara*.(2)

* *Present:* LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

(1) (1890) L. R. 17 I. A. 122.

(2) (1914) L. R. 41 I. A. 258.

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[LORD BUCKMASTER. Was the present objection made to the High Court?]

The record does not show whether the point was taken in argument, but the present appellant was entitled to assume that the High Court would not decide upon any ground not within s. 584. In any case, the objection being as to jurisdiction, and being taken by the appellant in his case upon this appeal, he is not precluded from relying upon it.

[MR. AMEER ALI. Does not the proviso to s. 109-A, sub-s. 3, give the High Court power to settle a new rent?]

The proviso applies only when the High Court allows an appeal upon a ground within s. 584 to which the sub-section is expressly made subject.

The respondents did not appear.

June 4. The judgment of their Lordships was delivered by

LORD BUCKMASTER. In this case the respondents have not been represented before their Lordships, who have, therefore, been deprived of the advantage of hearing counsel in support of the judgment of the High Court at Calcutta, which is the subject of this appeal, but, having given careful consideration to all the circumstances, they are unable to discover any sound argument by which that judgment can be supported.

The real question which the appeal involves is whether or no the High Court were at liberty to reverse upon the grounds assigned by them a judgment and fourteen decrees of the District Judge of Nadia, dated March 28, 1907.

The case arises under the following circumstances: The plaintiff, who is the present appellant, is the zamindar of eight villages, and on February 25, 1902, the Government of Bengal ordered a survey to be made covering these villages and a record of rights to be prepared under s. 101 of the Bengal Tenancy Act, 1885. The survey was accordingly made and the record of rights was duly published, but the appellant was dissatisfied with certain of the decisions of the Revenue Officer, and on March 9, 1904, instituted 290 suits for determination of the matters in dispute between himself and his tenants, and at the same time a number of applications were made both by the appellant and certain of the tenants for the settlement of rents,

in respect of the lands. The lands to which this dispute related were of two classes—jamai lands, in which the tenant had permanent rights, and utbandi lands, in which their rights were not permanent. It was alleged that the record of rights had not properly apportioned the lands between these two headings, and this was one of the questions that arose for determination, while others related to the means by which excess lands held by the tenants were to be assessed under s. 52 of the Act.

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The main feature of the dispute, however, related to the standard to be used in measuring the lands. The agreed unit was a rashi or chain, the appellant claiming that its length should be 14,040 inches, while the tenants claimed that the length should be 15,095 inches, the result of the tenants' contention being that the area they held was increased, the rent properly assessable and payable to the zamindar being accordingly diminished.

On December 4, 1905, the Revenue Officer delivered judgment in all the suits, which were tried together. He decided that as regards one village the proper standard of measurement was that claimed by the appellant, and was applicable to both classes of lands, while as regards the remaining villages the standard of the appellant was applicable to the utbandi land only, and that the larger standard claimed by the tenants was applicable to the jamai lands. He also held that the appellant had failed to prove except in one instance that the lands entered as jamai were utbandi, and he directed that in settling the rents an allowance of 10 per cent. should be made in favour of the tenants.

The appellant instituted an appeal in 109 of the said suits to the Court of the District Judge of Nadia; ten of the tenants also filed appeals to the same Court. Settlement took place with regard to many of the cases before the hearing, and only fifty-three of the appellant's appeals and eight of the tenants' were heard and decided by the District Judge. He delivered judgment on March 28, 1909, dismissing the tenants' appeals and deciding the plaintiff's substantially in his favour. The substance of his judgment was that upon the evidence the standard of measurement claimed by the appellant was the proper standard to be adopted both as to the utbandi and the jamai lands in seven of the villages, that the lands entered in the record of rights as jamai and claimed by the appellant

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to be utbandi were in fact utbandi lands, and that the excess lands should be measured as claimed by the appellant, but he confirmed the provisions as to the allowance of 10 per cent. in favour of the tenants.

Appeals were brought to the High Court at Calcutta by the tenants in fourteen of the said cases and in twenty-two others by the appellant under s. 109A, sub-s. 3, of the Bengal Tenancy Act, 1885, which is in these terms: "Subject to the provisions of Chapter XLII. of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a special judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that chapter: Provided that if in a second appeal the High Court alters the decision of the special judge in respect of any of the particulars with reference to which the rent of any tenure of holding has been settled, the Court may settle a new rent for the tenure or holding, but in so doing shall be guided by the rents of the other tenures or holdings of the same class comprised in the same record as ascertained under s. 102 or settled under s. 105 or s. 108."

By the operation of this section it is plain that the right of appeal is limited by the provisions regulating the right of appeal to the High Court from a subordinate Court, and these were to be found in s. 584 of the Code of Civil Procedure, 1882, the power as to the regulation of rents being dependent and consequent upon the alteration of the judgment upon the specified grounds.

Sect. 584 of the Code is in the following words: "Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely: (a) 'The decision being contrary to some specified law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure as prescribed by this Code or any other law which may possibly have produced error or defect in the decision of the case upon the merits.'" (1)

The appellant's present contention is that the real dispute between the parties could not be brought within any one of those provisions.

(1) Sect. 100 of the Code of 1908 is to the same effect.

The High Court, however, entertained all the tenant's appeals, reversed the decrees of the District Judge, restored the decrees of the Revenue Officer, and dismissed the appeals of the present appellant, and the question that arises is whether their judgment depended upon the District Judge having decided contrary to some specified law or usage having the force of law or on having failed to determine some material issue of law or usage having the force of law. There was no suggestion that there had been any error or defect in the procedure.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other ; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact.

Their Lordships have carefully considered the judgment of the High Court with these matters present to their minds, but they are unable to find that the decision of the District Judge stood in any shadowy borderland between fact and law. The question for determination was as to the character of certain lands, and as to what was the measurement properly applicable, and the real objection to the judgment of the District Judge was that there were underlying assumptions which vitiated his decision and that the form of his judgment showed that he had misweighed the evidence.

An examination of the judgment of the High Court makes this plain. The District Judge appears to have expressed the opinion that it is unusual that different standards of measurement should prevail at the same time in the same village, one for utbandi and one for jamai lands, and the High Court seems to think that that assumption was one which coloured his whole judgment, a proceeding which they say, was not justified in law. But it certainly is important to observe that both the parties were in agreement that whatever the standard of measurement, it was the same for both classes of lands, and though it may well be, as the High Court points out, that this in no way precluded the learned judge from holding that the standard was different, yet when both parties agree that whatever the standard is it must be the same, it is difficult, in the absence of more specific

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material than is before their Lordships, to decide that there was something fundamentally wrong in the statement of the District Judge, who would know the local conditions, that a difference in measurement would be unusual. A further and a severe criticism is made by the High Court because the learned judge stated that "Upon a consideration of the evidence I come to the conclusion that the standard which is one of 80 cubits prevails in the seven villages in dispute," and after this statement proceeded to deal with the evidence.

Their Lordships are quite unable to follow the reasoning that is adverse to a judgment so framed, and yet it appears from the judgment of the High Court that they accepted the contention on behalf of the tenant appellants that by reason of this statement the learned judge, in his subsequent careful and critical examination of the evidence, approached the question not with an open mind, but influenced by the fact that he had already arrived at a conclusion on certain assumptions. In the course of the judgment of the High Court this contention is set forth in the following terms : "It has been contended on behalf of the tenants that, in dealing with the evidence in the way in which the special judge has dealt with it, he has not given full effect to the evidence adduced on behalf of the tenants, that he has erred in the estimate which he has formed of its value, being misled by the conclusion at which he arrived on the assumption made at the commencement of his judgment, and that his conclusions are not sufficient to rebut the presumption that the entries in the record of rights are correct, or to displace the findings on the evidence which had been arrived at by the Revenue Officer. We admit that in the present cases the findings on some of the points, which are findings of fact arrived at by the Lower Appellate Court, are findings which we should hesitate to displace, but in dealing with this matter we have to consider whether, in arriving at those findings, the Lower Appellate Court has really approached the consideration of the evidence in an impartial spirit, or has been prejudiced by the conclusions arrived at from assumptions based on pure hypothesis. In our opinion the evidence adduced on behalf of the tenants, supported as it is to some extent by the evidence of some of the witnesses for the landlord, and supported also by the result of the inquiries made on the spot, is sufficient to support the conclusion at

which the Revenue Officer has arrived on a careful consideration of the whole of the evidence."

This seems to be the keynote of the judgment, and apart from the suggestion of prejudice and unreasonable assumptions, for which their Lordships can find no justification, it really amounts to no more than a finding that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion, but it is precisely this revision of evidence which is excluded by the limited character of the appeal.

It may well be that before different tribunals the witnesses summoned and the documents used would have created an opinion upon the merits of the controversy different from that which was formed by the District Judge. But upon this the High Court was not competent to enter; their functions were completely circumscribed by the provisions of the statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.

In their Lordships' opinion, therefore, the High Court have exceeded their jurisdiction, and this appeal must succeed.

When special leave was granted to the appellant by Order in Council dated August 12, 1913, to bring this appeal, conditions were imposed that the appellant should, in any circumstances, pay the respondents' costs. The respondents have not appeared, and this obligation therefore does not arise; but it follows that there will be no costs of this appeal, and their Lordships see no reason for interference with the order as to costs made by the High Court from which this appeal is brought. The dismissal of the appellant's appeals to the High Court has not been challenged.

Subject to this, the decrees of the High Court ought to be set aside and those of the District Judge restored and their Lordships will humbly so advise His Majesty.

Solicitors for appellant : *W. W. Box & Co.*

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Land Tenure in Bengal—Char acquired in 1833—Purpose of letting—
Tenure-holder—No accrued Right as Raiyat—Bengal Tenancy Act
(VIII. of 1885), ss. 5, 19.*

The appellants' predecessor in 1833 acquired from the Government extensive char lands in Bengal for the purpose of reclaiming them and then letting them at a profit to cultivators. There was some evidence that on occasions prior to 1885 the Board of Revenue and its subordinates had regarded the holding as raiyati:—

Held, that the appellants were tenure-holders within s. 5 of the Bengal Tenancy Act, 1885; and that s. 19, which saves occupancy rights accrued to raiyats prior to the Act, did not apply, as neither the appellants nor their predecessor had held a raiyati interest in the land.

APPEAL from a judgment and decree of the High Court (March 13, 1913) reversing a decree of the Subordinate Judge of Midnapur.

The suit was instituted by the appellants for a declaration that they were occupancy raiyats, and not tenure-holders, of certain char lands in Bengal, and for the settlement of a fair and equitable rent.

The facts, so far as they are material to this report, appear from the judgment of their Lordships.

The Subordinate Judge made a decree in favour of the appellants. He held that the presumptions arose under the Bengal Tenancy Act, 1885, that the appellants were tenure-holders, first, under s. 104 H, since they had been so entered in the record of rights; secondly, under s. 5, sub-s. 5, since the land exceeded 100 standard bighas in extent; but he held that those presumptions were rebutted. In support of that view he relied upon his finding of fact that the land was taken for reclamation purposes, there being then no tenants upon it, and upon evidence referred to in the judgment of

* *Present*: LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI, and
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their Lordships, which he considered showed that the Government had recognized the appellants and their predecessors as raiyats. Upon the first finding he relied upon *Durga Prosunno Ghose v. Kalidas Dut* (1) as an authority that the appellants were raiyats.

The High Court reversed the decision.

The learned judges (Chitty and Teunon JJ.) said that it was clear on the evidence, and was conceded, that Rupnarayan did not acquire the land for the purpose of cultivating it either by himself or by members of his family, and that there was no evidence that he proposed to cultivate it by hired labour. They held that the acts relied on as being recognitions by the Government of the tenure as raiyati did not outweigh the considerations which led to the conclusion that the appellants were tenure-holders under s. 5, sub-s. 1, of the Bengal Tenancy Act, 1885. Upon a contention that rights as raiyats had accrued prior to that Act they held that s. 5, sub-s. 1, of the Bengal Tenancy Act, 1885, by the words "or bringing it under cultivation by establishing tenants on it" had not effected a change in the law as to what constituted a tenure-holder. They said that the test laid down in the direction relied on by the Subordinate Judge for the purpose of distinguishing between a raiyati holding and a tenure had in later cases been held not to be exhaustive. Further, the contention was based upon the finding that there were no tenants on the land in 1833, with which finding they disagreed. They stated that if they had held that the appellants were raiyats they would have remanded the case for the fixing of a fair and equitable rent under s. 104 H.

1918. May 2, 3. *Dunne K.C.* for the appellants. The appellants should have been recorded as raiyats. The decision in *Debendra Nath Das v. Bibudhendra Bhramabar Roy* (2) does not apply, as in this case the appellants had accrued rights as raiyats prior to the Bengal Tenancy Act, 1885, coming into operation. Those rights were not taken away by that Act; they were expressly preserved by s. 19. The status of the appellants is to be determined by the law and the circumstances at the time when the tenancy was created. At that time the lands were unoccupied and Rupnarayan obtained actual possession. His interest therefore was a raiyati

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(1) (1881) 9 Cal. L. R. 449.

(2) (1918) L. R. 45 I. A. 72

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interest, and it was not altered upon his subsequently letting the lands : *Durga Prosunno Ghose v. Kalidas Dut.* (1) The Government from 1840 onwards recognized that the holding was raiyati. The Tenancy Acts of 1859 and 1869 contained no definition of a "raiya," and the holding was raiyati under those Acts ; that is supported by the terms of s. 6 of the former Act. Sect. 5 of the Act of 1885, by defining a tenure-holder as including one who has let to cultivating tenants, altered the law. But if that is not so, the holding was raiyati prior to 1859, and neither the Act of 1859 nor that of 1869 took away rights which had previously accrued.

Sir Erle Richards K.C. and *Sir William Garth* for the respondent were not called upon.

June 3. The judgment of their Lordships was delivered by

LORD SUMNER. A record of rights under ch. 10 of the Bengal Tenancy Act (VIII. of 1885) was published on September 2, 1908, under which the appellants were entered as "tenure-holders" of Mauza Rupnarayan Char, which is situated on the river Hugli within the khas mahal of the Government in the district of Midnapur. The rent, which had been payable under the previous settlement, was on this occasion considerably enhanced. Being aggrieved by this increase, the appellants brought the present suit for a declaration that they were "raiya" and not "tenure-holders," and for a reduction of the rent to a fair and equitable sum under s. 104 H of that Act. Whether they really are "raiya" ultimately depends on questions of fact ; one must "look to the attendant circumstances to judge of the purpose" for which the land was acquired : *Debendra Nath Das v. Bibudhendra Bhrambar Roy.* (2) The trial judge decided in their favour, but his decision was reversed on appeal.

It lay on the appellants to rebut the statutory presumption that the record of rights was correct (s. 103 (b)), and, as the holding exceeded 100 bighas, the further statutory presumption that the holders of it were "tenure-holders" (s. 5, sub-s. 5). Furthermore, the time and circumstances of the origin of their rights were in this case not mere matter of conjecture or of inference, but were proved in substance and in considerable detail. The evidence is examined

(1) 9 Cal. L. R. 449.

(2) L. R. 45 I. A. 72.

at length in the judgment under appeal. Rupnarayan, the plaintiffs' original predecessor in title, was not a cultivator. He was by caste a Kayestha and by occupation a petty Government official, a local salt daroga. Before his time the Government had no tenant on the land, which had been diluviated and was unoccupied. In the early thirties of the last century he found money—and no small sum either—with which he began to build embankments and other works to reclaim the char lands then reforming in the river bed. The char afterwards bore his name and eventually the land was brought into cultivation. It is certain that, at some later date, actual cultivation was being done by peasants, who paid rent to Rupnarayan, as they do still to his successors, and there is no evidence that Rupnarayan or his sons or his servants ever actually cultivated a single bigha. He did not reside on the char, but followed his avocation elsewhere. A ruidad of 1844, relied on by the plaintiffs, which narrates the origin of this reclamation, describes him as having been of Majipara, in the district of Nadia.

These simple facts led the High Court to the conclusion that he was not what the Bengal Tenancy Act (s. 5) calls a " raiyat " ; he was, in fact, a middleman, and a very useful one. The question is, " For what purpose was the land originally acquired ? " The answer is plain : He reclaimed the char in order to make money out of it by letting land to cultivators. In view of these facts, it is impossible to say that the High Court were wrong in holding that he was neither a cultivator nor a raiyat, in the sense in which that term is used either in the Bengal Tenancy Act or in ordinary speech. That being so, the plaintiffs' tenure, which was derived from him, was not a raiyati holding, and their case failed.

It is true that they produced a series of documents beginning about 1840 and coming down to 1882, and relied on them as showing that this char had been reputed to be a raiyati holding, but until 1879 none used that word. At most they were consistent with a raiyati holding, if that holding could otherwise be established. In themselves they were neutral and obscure. In their Lordships' opinion the learned trial judge placed on them a value which was higher than they could bear, and appears to have found support for the view which he took of the plaintiffs' documents in the

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J. C. view which he took of the defendants' witnesses, namely, that they
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In 1879, forty odd years after Rupnarayan's right had accrued, whatever it really was, some one served the plaintiffs with a notice of enhancement of rent under Bengal Act VIII. of 1879 as being raiyats, and in 1882 the Board of Revenue, in pronouncing on their petition for reduction of the recently settled rental, point out that the petition laid claim to a hereditary and transferable tenure without showing any justification for it, and observe that in 1845 and recently the tenure had been in fact treated as raiyati, a view which the documents produced only doubtfully support. After allowing the fullest weight to these official documents as evidence, which is not considerable, their Lordships must observe that the first does not purport to have been prepared by any one who had knowledge of the facts, and that if the second rested, as seems to be the case, on the documents produced by the plaintiffs at the trial, its statements are only doubtfully supported by them. Their Lordships are unable to think that these records are sufficient, even in conjunction with the earlier documents produced, to rebut the above-mentioned presumptions, or to establish that the appellants' rights are those of occupancy raiyats.

Sect. 19 of the Bengal Tenancy Act saved rights, accrued and existing before it came into force, and no doubt the nature of those rights must be judged in accordance with the law as it stood when they arose, unless subsequent changes in the law have operated to alter them. It is contended that not only were the terms "raiya" and "tenure-holder" undefined by any statute before 1885, but that the definition then given to them did not reproduce the meaning which they had previously borne, and that, in fact, in the middle of the nineteenth century "raiya" would have been the term to apply to Rupnarayan, even though he reclaimed the land merely in order that it might be cultivated by others paying rent to himself and without any intention of cultivating on his own account, and that accordingly he acquired and passed on a raiyati holding, which, though not raiyati within the statute for the purposes of its definition, would still be within it for the purpose of the relief given by s. 104 H. No decision was produced to that effect; the judgment of Field J. in the case of *Durga Prosunno Ghose v. Kalidas*

Dut (1), when carefully examined, has clearly a different import. No universal definition of a raiyati interest was there laid down. No instance was cited to their Lordships of such a use of the word "raiyyat," and the use of the words "cultivated or held" in s. 6 of the Tenancy Act (X. of 1859) has no such effect, and therefore need not be particularly examined.

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The appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *W. W. Box & Co.*

Solicitor for respondent: *The Solicitor, India Office.*

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ARUMUGAM CHETTI AND OTHERS. . . RESPONDENTS.

July 2.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Madras Rent Recovery Act (Mad. Act VIII. of 1865), s. 11—Payment of enhanced Rent—Implied Contract—Absence of Consideration.

The Madras Rent Recovery Act, 1865, s. 11, among rules to be observed in the decision of suits regarding rates of rent, provides "all contracts for rent, express or implied, shall be enforced."

A tenant of dry lands sank a well at his own cost and thereafter cultivated the land with garden crops. Prior to the sinking of the well the tenant had always paid a uniform rent on a dry basis; subsequently the landlord claimed, and the tenant for some years paid, an enhanced rent, namely, at the garden crop rate. In a suit by the tenant to obtain pattas at the usual dry rate:—

Held, that there was an implied contract to pay rent at the dry rate and that there was no consideration to support an implied contract to pay at the enhanced rate; further, that to construe the original contract as a contract to pay at the dry rate only so long as the land remained dry, leaving the subsequent rent to depend upon the produce, would be repugnant to the Act.

CONSOLIDATED APPEAL from a judgment and several decrees of the High Court (September 21, 1910) reversing decrees of the District

* *Present*: LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

J. C. Judge of Madura and restoring decrees of the Sub-Collector of
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The respondents severally instituted suits in 1903 against the appellant, their landlord, under the Madras Rent Recovery Act (Mad. Act VIII. of 1865) for the grant of proper pattas. They claimed that the pattas should be at the rate for dry crops (i. e. 4 fanams per guli), and not at the rate for garden crops (i.e. 8 fanams per guli). The appellant pleaded (1.) that there was an implied contract for payment at the garden crop rate; (2.) that in the villages of the zamindari there was a long-standing custom or local usage by which the rents varied with the nature of the crops, and that 8 fanams a guli was in conformity with local usage.

It appeared from the evidence, or was admitted, that formerly a uniform rent at the dry rate (4 fanams per guli) had been paid; that each of the respondents at his expense had constructed a well upon the land of which he was tenant, and had thereafter cultivated it with garden crops; that the appellant thereupon, for periods varying in the suits from two to forty years, had claimed and been paid rents based upon the garden cultivation rate (8 fanams per guli).

The course of the litigation, which had extended over many years, appears from the judgment of their Lordships.

The present appeal was from a judgment of the High Court (Abdur Rahim and Ayling JJ.) reported at I. L. R. 35 M. 13⁴, by which it was held, after a remand, that there was no consideration to support an implied contract by the respondents to pay at the enhanced rate. By a previous decision of the High Court, reported at I. L. R. 28 M. 444, it had been held that the custom alleged, even if proved, was unenforceable as it conflicted with s. 11 of the above-mentioned Act. Upon a Letters Patent appeal, unreported, when the Court affirmed an order remanding certain of the suits for trial on the question whether there were implied contracts, it had been held that the issue as to a custom could not be reopened on the remand.

1918. May 10, 13. *De Gruyther K.C.* and *Dube* for the appellant. Prior to the Act of 1865 the zamindar was entitled to a share of the produce of the land as rent. The policy of that Act was to provide a rent equivalent to the produce. The former rent

in these cases was fixed on the dry basis ; by the contract then implied the rent was liable to enhancement upon the land being cultivated for garden produce. Further, the payment of rent at the enhanced rate over a period of years gave rise to an implied contract, within s. 11 of the Act, to pay that rent ; the former contract having ceased to apply, there was good consideration. The respondents are estopped under the circumstances from denying their liability. [Reference was made to *Natesa Gramani v. Venkatarama Reddi* (1), *Suppa Pillai v. Nagayasami Thumbichi* (2), *Parthasarathi Appa Row v. Chevendra Venkata Narasayya* (3), Madras Rent Recovery Act (Mad. Act VIII. of 1865), ss. 3, 6, 7, 8, 11, and Fifth Report (Madras), p. 8.]

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Parikh for the respondents. The argument as to the effect of the original contract was not put forward at any previous stage of the litigation. The appeal to the High Court proceeded entirely upon the question whether there was an implied contract under s. 11. In any case the contention is repugnant to the policy of the Act. The rents were fixed at the original survey assessment in 1803 upon the dry basis, and had been paid upon that basis until the wells were constructed. There was presumptive evidence of a contract to pay rent at the dry rate : *Venkatagopal v. Rangappa*. (4). No contract can be implied to pay at a higher rate. Payment at the enhanced rate does not show a consensus unless the tenant knew that there was no right to increase the rent. But even if there was a consensus there was no consideration which would render the agreement enforceable. The cases referred to for the appellant are distinguishable. In those at L. R. 37 I. A. 110 and I. L. R. 30 M. 511 the rent had not been fixed, and in the latter case no question arose as to want of consideration ; in the case at I. L. R. 31 M. 19 an express contract was established.

De Gruyther K.C. replied.

July 2. The judgment of their Lordships was delivered by LORD SUMNER. This was a consolidated appeal in suits brought by a number of raiyats in the zamindari of Gandamanaickanur

(1) (1907) I. L. R. 30 M. 510.

(2) (1908) I. L. R. 31 M. 19.

(3) (1910) L. R. 37 I. A. 110.

(4) (1883) I. L. R. 7 M. 365 369

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 ARUMUGAM. — against their landlord, the zamindar of Ettiyapuram, in the district of Tinnevely. He had tendered pattas for fasli 1312, at 8 fanams per guli, at which rate they had paid rent for several years. These the raiyats rejected, claiming that the proper rate was 4 fanams only, and brought these suits under s. 8 of the Madras Rent Recovery Act (No. V II. of 1865) to obtain such pattas as they said they were entitled to receive.

The Act of 1865, though since repealed by the Madras Estates Land Act (No. I. of 1908), was the Act then in force, and in suits "involving disputes regarding rates of rent," s. 11 provides that "all contracts for rent, express or implied, shall be enforced." Though this statute does not define "rent," s. 3, which makes the delivery of pattas and muchalkas mutually obligatory, requires that they shall state "the amount and nature of the rent," according as "it is payable in money or in kind or by a share in the produce." Regulation XXX. of 1802, which had provided for such written records, and for fixing rents by the rates in the Government assessment, was generally silent as to rents fixed by contract between the parties. The judgment in *Venkatagopal v. Rangappa* (1) explains the circumstances under which, between 1802 and 1865, it had become necessary to give effect to contracts and not merely to status and usage, and more particularly to such contracts as are implied from bare payment and acceptance of rent at a particular rate or measured in a particular way. Whether the framers of the Act fully appreciated its effect or not, the expression "implied contract" is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English law. Accordingly the scheme of the section was as follows : If a contract, express or implied, and legally enforceable, was once established, the issue was determined and the proper patta was one giving effect to that contract. If, on the other hand, no such contract could be established, then, since in the words of the District Judge on the second hearing in his Court, "it is not pretended that this zamindari was surveyed by Government before the 1st January, 1859," local usage could be proved. If such usage established a proper rent, then either party, if dissatisfied with it, could require resort to the varam customary

(1) I. L. R. 7 M. 365.

in the village for the division of the crop between landlord and tenant (of which no evidence was given or could have been given in these suits, as events happened), and, failing proof of such a customary varam, it would have been the collector's duty to fix such rate as he thought just, "after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the raiyat." It followed, under this scheme, that if these raiyats failed to prove an implied contract at 4 fanams enforceable between the parties, and if the landlord succeeded in proving such a contract at 8 fanams, no further issue arose for decision.

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The course which the litigation took was this : Thirty-eight suits were begun in 1903, and, although the raiyats came from different villages in the zamindari, and had paid the garden rate for very varying terms, one alone, taken as typical of the rest at any rate so far as concerns the present appeal, was gone into. It was the suit brought by Arumugam Chetti, of the village of Pumalaigandu, in the zamindari of Gandamanaickanur. The common state of facts was this. At some date, which varied a good deal from case to case, the raiyat had made a well or tank at his own expense to water the land, which had been "punja" or dry land before, and thereafter, thanks to the water supply, he resorted to garden cultivation. No permission for the working of these wells was required on the part of the zamindar. Rent had previously been paid at the rate of 4 fanams per guli, the usual "dry" rate : thenceforward, it was always demanded and paid at the rate of 8 fanams per guli, which was alleged to be the usual rate for "garden" cultivation. There seems to have been no demur to the 8 fanams rate till 1903, and presumably pattas and muchalkas at this rate were regularly exchanged, in accordance with the Act.

Arumugam Chetti, the selected plaintiff, pleaded, rather indefinitely, that the field in question "was a punja land, bearing 4 fanams rate of assessment," but that since the well had been sunk "the defendant had been charging garden assessment," without having any right to do so. The zamindar did not deny the raiyat's statement quoted above, but, besides relying on the actual payment of rent without dispute at the rate of 8 fanams, pleaded "a long-standing custom for the zamindar to collect teerva from the raiyats

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according to the following rate—(1.) from 8 fanams to 10 fanams per guli for garden cultivation; and that, “in the said zamindari, the faisal rates have been fixed in fasli 1210 at 15 fanams per guli for garden cultivation.” The record leaves the actual course taken at the trial on these pleadings somewhat conjectural.

The Sub-Collector rejected the zamindar's evidence of custom, and made decrees in favour of the raiyats, observing that their lands were “lands formerly paying punja rates (4 fanams).” He appears to have understood the custom pleaded by the zamindar to have been “a general custom to charge enhanced rents for garden crops, when raised by plaintiffs, irrespective of any improvement or alteration in the land made at plaintiffs' expense,” and he held such a custom to be bad in law, as being contrary to the policy of the Act, relying on *Venkatagiri Raja v. Pitchana* (1) and *Fischer v. Kamakshi Pillai*. (2) There is nothing in his judgment to show that a contract existing before the wells were made, for a rent at the dry rate of 4 fanams was either expressly proved on the one hand, or expressly questioned on the other, but there is good ground for thinking that the case could not have taken the course it did, unless the zamindar had conceded the existence of such a contract before the wells were made, and had alleged its supersession by another contract, since the payments at the garden rate began. In the High Court on the first hearing (3) Subramania Ayyar J. says in terms that “in the Lower Courts the parties throughout proceeded in all these cases on the footing that there were no facts to try, except as to the existence of the alleged custom,” and then proceeds to discuss the validity of such a custom, and whether or not the alleged contract to pay at the 8 fanam rate was or was not nudum pactum. This is only consistent with his having taken the view above stated of the course of the case at the trial on the arguments presented to the Court. Twenty-seven of these suits were appealed to the District Judge. In these cases the maximum period since the wells were made and payment of the garden rate of rent began was eighteen years. Eleven others, in which the period was over forty years, and therefore went back to a date before the passing of Act VIII. of 1865, had been reserved by the Sub-Collector for separate trial.

(1) (1886) I. L. R. 9 M. 27.

(2) (1897) I. L. R. 21 M. 136.

(3) (1905) I. L. R. 28 M. 444,

447.

The District Judge allowed these appeals and made an order for a remand. On appeal to the High Court there was a difference of opinion on the first hearing, and on a second, under s. 15 of the Letters Patent, the order of the District Judge was affirmed and the cases were sent back to the Sub-Collector. It is important to observe two things: (1.) the zamindar had not appealed against the order as actually made by the District Judge; he appears to have been satisfied with it as it stood, whatever its true meaning and effect might be; (2.) the High Court interpreted that order as meaning merely that the Sub-Collector ought to try the question, whether a presumption of the fact of an implied contract arose in any particular case, on the facts of that case, and declared that "Under the order of remand it is not competent to either party to reopen the question of custom raised in the first preliminary issue." Accordingly, neither on the remand nor in the subsequent proceedings until the appeal to their Lordships' Board has this question of custom been further raised. As the now appellant acquiesced in its being thus disposed of, and as the judgment appealed against accordingly does not deal with it, their Lordships cannot now entertain this point as a ground of appeal. It is enough to say that, if the custom was meant to refer to the determination of rates of rent "according to local usage," the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject; and if, on the other hand, it was meant to be, as the Sub-Collector understood, a general custom to enhance rent, if the tenant enhanced the value of the land at his own expense, then the zamindar was asking the Sub-Collector to do what the Act forbade him to do, at any rate then, in the last resort, and in default of proof of contract or of varam he came to fix a rent which he considered to be just. It never appears to have been suggested that what was meant was a custom of the country, with reference to which the raiyats or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zamindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, and to imply a new contract for that purpose.

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The hearing upon the remand took place in 1907. By this time

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seventeen of the thirty-eight suits of 1903 had been disposed of, or in some way had disappeared ; but further suits had been brought for 1904 and 1905, respectively thirty-one and thirty-eight. Thus ninety suits were eventually dealt with ; but again the suit of Arumugam Chetti was treated as typical of all, though he had " paid this enhanced rate for the first and only time in fasli 1311, the year before suit." Again the Sub-Collector decided for and the District Judge against the raiyats, though neither Sub-Collector nor District Judge was the same person who had officiated before. Again, on appeal to the High Court, the raiyats succeeded, and now it is the zamindar who appeals to their Lordships' Board.

The judgment of the High Court, now appealed against, says, " in the present suits it is admitted that, prior to the construction of the wells, the tenants had always been paying the uniform punja rate of 4 fanams a guli for the suit lands, and this as far back as can be traced." From such facts it would be a legitimate inference that a contract to hold the lands at a 4-fanam rate of rent might be implied, and, when this is taken in conjunction with the terms of raiyati tenure, such a contract has at any rate an element of fixity, since so long as the raiyat's rent is paid the zamindar cannot dispossess him against his will. It need not necessarily be inferred that such an implied contract gives a right of occupation at the punja rate in perpetuity. It would be enough for the purpose of the present case if its duration is implied to be so long as circumstances affecting the holding remain unchanged, otherwise than by the labour and outlay of the raiyat himself. This is the basis of the decisions in favour of the raiyats. How then is another and subsequent contract to be implied replacing the contract at the " dry " rate by a new one at the " garden " rate? The District Judge found as a fact, at the second hearing in his Court, that, in view of the long continuance of payments of rent at the garden rate, " in each and every case there was an implied contract to go on paying those rates, if not as long as the relationship of landlord and tenant continued, certainly, as long as the conditions remained unchanged," and on this Ayling J., delivering the judgment of the High Court, which is now under review, says : " The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants for a number of years varying from two to forty. The

corroborative evidence is meagre, but I am not prepared, on second appeal, to set aside the District Judge's finding in this respect."

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The question for their Lordships then comes to be that of consideration for the subsequent agreement at garden rate thus implied. What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the raiyat was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the raiyat's assumed promise to pay at the 8-fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the varam system, if the raiyat refused to consent to pay at the rate of 8 fanams, but, under the Act, if there was an implied contract for the 4-fanam rate, that contract had to be enforced, and there was no question of resorting to the varam system. By the admissions such an implied contract did exist. As, by consent, all the cases have been treated as typified sufficiently by Arumugam Chetti's case, no point can be made that in the cases where the 8-fanam rate had been paid for over forty years the question arose before the Act of 1865 was passed; but, even if it could, there is no evidence that there was any varam in the village in question. If it be said that at any rate the landlord could have put the tenants to the trouble of proceedings in the Sub-Collector's Court and forbore to do so, there is no evidence that there was actually any such forbearance. Besides, if he had done so, still, by the hypothesis, proof of the implied contract for the dry rate would have promptly defeated him, nor can it be said that a valid consideration can be found for the abandonment of the raiyat's rights in the zamindar's submission not to raise a hopeless and groundless dispute of those rights, any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum.

The High Court therefore concluded that the implied agreement to pay the 8-fanam rate, though found as a fact, could not be enforced for want of consideration, and accordingly if the contract to pay the 4-fanam rate still stood it was enforceable. Some contention was raised that the raiyats were estopped by their conduct in paying the garden rate, but this estoppel in pais, for what it might be worth,

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rested on an implied representation of some existing fact, on the faith of which the zamindar had changed his position, and of this there was no evidence. The contention was really only the implied contract for the garden rate in another form. A further argument has been advanced, turning on the supposed true intent of the original contract for the 4-fanam rate, namely, either that it was a promise to pay the 4-fanam rate so long as the land should remain dry, and then, if garden cultivation should take place, to determine that contract, leaving the parties to make a new one, express or implied, and in default to resort to the varam system, or else, in the alternative, that there never had been two implied contracts, but really from the beginning only one, to the effect that the raiyat would pay at the 4-fanam rate for the land while dry, and at the 8-fanam rate or some appropriate garden rate for the land when under garden cultivation, no matter at whose expense the water supply should be procured, and this as the legal result of this tenure having originated historically, as it is said, in a division of the produce of the holding, such as it might be from time to time, between raiyat and zamindar in accustomed proportions. To both arguments there must be the same answer. The zamindar throughout contended for a new contract, arising in each case when the 8-fanam rate first began to be paid, and this is what the District Judge found and the High Court accepted. No case was made below, when the facts were examined or admitted, that the question was merely one of applying a very ancient agreement to new circumstances in accordance with its terms ; nor would it be easy, to say the least of it, to suppose that any raiyat voluntarily agreed to have his rent enhanced whenever his own outlay should have rendered an improved mode of cultivation possible. Furthermore, such a theory, if applicable at all, is of general application and is repugnant to the whole scheme of Act VIII. of 1865, which is based on the idea of making contract paramount, even when it is only implied, and of recognizing agreed rents in supersession of division of the produce, which is to be resorted to only if no contract for a rent can be proved and if the fixing of rent according to the local rate is objected to.

In the result the whole case now turns on the question whether there was any consideration for the new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract

of tenancy at the rate of 4 fanams per guli. Their Lordships agree with the High Court that the answer must be "none." If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost patta at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen. As it is, their Lordships must deal with the case as they find it. They will humbly advise His Majesty that the appeal should be dismissed with costs.

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Solicitor for appellant : *Douglas Grant.*

Solicitors for respondents : *T. L. Wilson & Co.*

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RADHA CHARAN DAS AND ANOTHER . . RESPONDENTS.

June 18.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Revenue Sale—Notification—"Official Gazette"—Calcutta Gazette—Government Vernacular Gazette—Bengal Land Revenue Sales Act (XI. of 1859), ss. 6, 33.

The "official Gazette" in which by s. 6 of Act XI. of 1859 a notification is to be published of the revenue sales therein referred to is the *Calcutta Gazette*. A sale is not "contrary to the provisions of this Act" within s. 33 by reason of no notification having been published in a Government vernacular Gazette circulating in the locality.

APPEAL from a judgment and decree of the High Court (July 1, 1913) reversing a decree of the Subordinate Judge of Cuttack.

In 1909 an estate in Orissa then owned by the appellants was put up for sale for arrears of Government revenue, a notification of the sale having been published in the *Calcutta Gazette*, and was purchased by the respondents.

* *Present:* LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

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The Commissioner having rejected an application by the appellants to set aside the sale, the appellants instituted the present suit with that object. By their plaint they submitted that a notification of the sale in the Government vernacular Gazette for Urya was necessary under s. 6 of Act XI. of 1859 ; they alleged that by reason of the omission so to notify the sale the estate had been sold for an inadequate price, and they had suffered substantial injury.

It appeared that the practice in Bengal was that all notifications required by law to be made by local Governments were published in the *Calcutta Gazette*, selected portions being translated and published in the Government vernacular Gazettes. In 1895 the Government of Bengal, in revising the matters so to be notified in the Government vernacular Gazette for Urya, ordered that the publication of revenue sale proclamations should be discontinued. Notification of revenue sales in the *Urya Gazette* was resumed in 1911.

The Subordinate Judge held that a notification in the *Urya Gazette* was necessary under s. 6, and that the omission rendered the sale void, even if substantial injury was not proved under s. 33. He found as a fact that the price was not inadequate for a revenue sale, but on the ground above stated decreed the suit.

The High Court reversed the decree. The learned judges (Richardson and Newbould JJ.) held that the notification in the *Calcutta Gazette* was a sufficient compliance with s. 6 of the Act. They were further of opinion that, in any case, under s. 33 the omission to publish a notification in the *Urya Gazette* would not have rendered the sale void, since no substantial injury had resulted therefrom.

1919. June 18. *Dunne K.C.* and *T. B. W. Ramsay* for the appellants. Under s. 6 of Act XI. of 1859 a notification of the sale should have been published in the Urya Government Gazette. When a vernacular Gazette exists "the official Gazette" referred to in that section is not solely the *Calcutta Gazette*. The word "Gazette" in s. 6 must be read as including the plural under the General Clauses Act (X. of 1897), s. 13. It was expressly held by a Full Bench in *Lala Mobarak Lal v. Secretary of State for India* (1)

that failure to comply with s. 6 rendered the sale void, apart from inadequacy of price. That decision was not overruled by *Gobind Lal v. Ramjanam Misser* (1); that appeal did not arise under s. 6, but under s. 17. The evidence shows that the price was inadequate.

Kenworthy Brown for the respondents. The notification in the *Calcutta Gazette* was a sufficient compliance with s. 6. But, in any case, under s. 33 an omission to publish a notification in the vernacular Gazette did not avoid the sale in the absence of proof of substantial injury. The judgment of the Board in *Gobind Lal's Case* (1) refers expressly to irregularities in publishing the sale, and is applicable. The decision in *Tassaduk Rasul Khan v. Ahmed Husain* (2), under the provisions of ss. 289, 290, and 311 of the Code of Civil Procedure, also strongly supports the respondents.

[He was stopped.]

The judgment of the Board was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment and decree of the High Court at Calcutta, dated July 1, 1913. That decree reversed a judgment and decree of the Subordinate Court of Cuttack, dated March 30, 1911.

The suit was one to set aside a sale for arrears of Government revenue. The sale had been conducted under the provisions of the leading statute, Act XI. of 1859.

By s. 33 of that statute it is provided that no such sale "shall be annulled by a Court of justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of." The defect of procedure which is said not to be merely an irregularity but to amount to an illegality is this—that publication of the notification of sale was necessary in the *Urya* vernacular Government Gazette, circulating in the district. By order of the Lieutenant-Governor, manifestly made for purposes of public convenience, it was provided that a notification of sales should not appear in that publication. On the hypothesis, which is by no means admitted, that non-publication in the *Urya Gazette* was an irregularity, the question for the Board is whether the omission was an illegality.

(1) (1893) L. R. 20 I. A. 165.

(2) (1893) L. R. 20 I. A. 176.

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The main provisions applicable to the conduct of sales, namely, those of ss. 3, 5, and 6 of the statute, were in all points complied with. Those sections provide, not only for notification in the "official Gazette," which is, on the proper interpretation of those sections, the official Gazette published in Calcutta, but they also make provisions for a local mode of communication in the particular district, namely, "in the language of that district, in the office of the collector," otherwise as set forth in s. 3. In these circumstances their Lordships are of opinion that no ground has been made out in the present case for the argument that this sale has been made by procedure contrary to the provisions of this Act.

Their Lordships are of opinion not only that there has been no contravention of the provisions of the statute, but that, even if their view was that any irregularity had been committed, upon which it is not necessary to enter further, there has been no proof offered that any substantial injury arose to the appellants in consequence of the irregularity complained of. On the latter point all the Courts below are agreed, that is to say, that it is not established that the appellants bring forward a case of any substantial injury attributable to the irregularity which they allege. The essential conditions for setting aside the sale have accordingly not been satisfied.

In those circumstances their Lordships do not doubt that the High Court have come to a correct conclusion, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Ranken, Ford & Chester.*

SURYANARAYANA AND OTHERS APPELLANTS ;

AND

PATANNA AND OTHERS RESPONDENTS.

J. C.*

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July 1.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Inam—Lost Grant by Native Ruler—Ownership of Soil—Kudivaram—Presumption—Madras Regulation XXXI. of 1802—“Estate”—Madras Estates Land Act (I. of 1908, Mad.), s. 3, sub-s. 2(d).

In the absence of evidence as to the terms of an inam grant made by a native ruler before British rule there is no presumption of law that the grant was only of the royal revenue from the land, and not of the soil.

Having regard to the terms of Madras Regulation XXXI. of 1802, the entry of an aghaharam village in an inam register as having been granted by a Reddi king in 1373, and enjoyed by the grantee's successors for 429 years, shows conclusively that the soil of the village was granted, there being, in the present case, dumbalas, also evidence as to the way in which the inamdars had treated the lands, which supported that view, and no evidence that at the date of the grant there were tenants having occupancy rights.

The village so entered consequently is not one “of which the land revenue alone has been granted,” so as to be an “estate” within s. 3, sub-s. 2 (d), of the Madras Estates Land Act, 1908; and the inamdars therefore can maintain suits in the civil Court to eject tenants under leases made prior to 1908 for terms which have expired.

CONSOLIDATED APPEALS from a judgment and three decrees of the High Court (October 9, 1913) affirming decrees of the District Court of Kistna, which set aside decrees of a District Munsif's Court.

The appellants held about two-thirds of the inam village of Korragunta in the Northern Circars. The respondents severally held from them parcels of land therein under leases entered into at recent dates but prior to 1908. Each lease contained the following or a similar clause: “As I have taken the land temporarily for cultivation, and as I have no zeroyati thereto, you shall take possession thereof at the end of the term without need of relinquishment

* *Present:* LORD ATKINSON, SIR JOHN EDGE, and SIR WALTER PHILLIMORE, BART.

J. C. by me." It appeared from the evidence that at, or shortly before,
1918 the date of each lease the parcel leased had been vacant.

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The appellants brought three suits in the Court of the District Munsif of Masulipatam to eject the respondents, each of whom pleaded that the parcel leased to him constituted an "estate," or part of an "estate," within s. 3, sub-s. 2 (*d*), of the Madras Estates Land Act, 1908, and that consequently under s. 189 the Revenue Court alone had jurisdiction. The suits were tried together throughout.

The terms of the inam grant under which the appellants held could not be proved. The earliest history of the village appeared from the back of a dumbala dated 1789. It was there stated to have been granted by a Reddi king in 1373 to Brahmins as a "sarva" agraharam, paying nothing to the circar, and to have been confirmed by succeeding rulers at various dates. Dumbalas dated 1785, 1796, and 1797 allowing the inamdars to remove the crops were produced. The village was entered in inam registers, the earliest being dated 1797, as a sarva agraharam, the original grant being stated to have been as above mentioned. There was no evidence that at the date when the grant was made or confirmed any person other than the inamdars was in occupation of the lands under any claim of permanent right, or at all.

A considerable body of evidence was adduced by the plaintiffs to show that for a period of about twenty years the inamdars had dealt with the land and the tenants upon the basis of being owners of the soil. Some evidence to the contrary was adduced by the defendants, and it was also proved that in 1845 the inamdars, who prior to that date had not resided in the village, came to live there in order to facilitate the collection of the rent.

The District Munsif made decrees for ejectment. He held that there was no presumption that the grantees did not own the kudi-varam, and that the respondents, upon whom the onus lay to show that the Court had not jurisdiction, had failed to prove the necessary facts.

The District Judge upon appeal set aside the decrees, holding that the village was an estate within s. 3, sub-s. 2 (*d*), of the Act. He said that it had been laid down in a series of judgments and in the Fifth Report that the ancient Indian rulers had no ownership

in the soil, but only a share in its produce ; it was therefore to be inferred that the grant was only of the royal revenue. That view was supported by the fact that the grant was to Brahmins, and by the evidence that prior to 1846 the inamdars had not resided in the village. He considered that the evidence did not prove that the appellants owned the kudivaram, so as to displace the presumption of law which he held arose. He further held that the exception in s. 8 of the Act applied only when an inamdar, who had not previously the kudivaram, acquired it in the whole of the inam lands.

The decision of the District Judge was affirmed by the High Court ; the appeal is reported at I. L. R. 38 M. 608. The learned judges (Sadasiva Aiyar and Spencer JJ.) upon their view of the authorities agreed with the view of the District Judge that there was a presumption of law that the grant had been only of the royal revenue from the land ; they concurred in his finding that that presumption was not displaced by the evidence. They further held that the inamdars had not subsequently acquired the kudivaram so as to bring the cases within the exception to s. 8 of the Act.

1918. May 30, 31 ; June 3, 4, 6. *De Gruyther K.C.* and *Kenworthy Brown* for the appellants. The lands in suit are not an "estate," or part of an "estate," within s. 3, sub-s. 2 (d), of the Madras Estates Land Act, 1908. The respondents were seeking to exclude the jurisdiction of the civil Court ; the onus was therefore upon them. It was not shown that at the date of the grant, or when it was confirmed, there were any persons in occupation other than the grantees ; it is probable that in 1372 the land was waste. Under these circumstances it cannot be presumed that the grant was of the revenue only. The decisions relied on do not establish as a general proposition that a grant to an inamdar is to be presumed to have been a grant of the revenue only. [Reference was made to *Vaman v. Collector of Thana* (1), *Ravji Mandlik v. Dadaji* (2), *Rajya v. Balkrishna Gangadhar* (3), and *Bhadrayya v. Bapayya*. (4)] Cases in which it appeared, or was to be inferred, that there were tenants other than the grantees at the date of the

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(1) (1869) 6 Bom. H. C. (A. C. J.)
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(2) (1875) I L. R. 1 B. 523.

(3) (1905) I. L. R. 29 B. 415.

(4) (1910) 21 Mad. L. J. 803.

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grant are to be distinguished ; so also are cases of grants for services. The Madras High Court in the present and some other cases has given effect to the presumption, but the decisions of that Court in *Kadambi Jagannatha v. Pidikiti Kutumbarayudu* (1) and *Virabhadrayya v. Sonti Venkamma* (2) support the appellants ; the latter related to a sarva agraaharam and is therefore particularly applicable. The contention that the ancient rulers of India claimed no ownership of the soil is not established by authority. It is entirely inconsistent with the preamble to Madras Regulation XXXI. of 1802 : see also Fifth Report, vol. 2, p. 84. The Government, whether before or after British sovereignty, was competent to grant all rights in the land, subject to rights of occupancy tenants, if any. The entries in the inam registers kept under s. 15 of the Regulation show that the soil was granted, and that view is supported by the dumbalas. The tenants by the leases, which were prior to 1908, expressly recognized that no occupancy right existed and covenanted to give up possession. Further, at the date of the leases the parcel leased was vacant, or was being cultivated by the inamdars ; if any outstanding kudivaram had existed it was therefore acquired by the appellants by surrender, and the cases fall within the exception to s. 8 of the Act : *Ponnusamy Padayachi v. Karuppudayan*. (3) The statutory presumption under s. 6 of the Act does not arise, as the kudivaram was in the appellants when the Act was passed.

Dube for the respondents. Sect. 3, sub-s. 2 (d), of the Act applies. Decisions in India establish that in the absence of evidence as to the terms of an inam grant it is to be presumed that it was only a grant of the revenue : *Krishnarav Ganesh v. Rangrav* (4) ; *Vaman v. Collector of Thana* (5) ; *Ravji Mandlik v. Dadaji* (6) ; *Ramchandra Mantri v. Venkatarao* (7) ; *Rajya v. Balkrishna Gangadhar* (8) ; *Narasimhulu v. Narasimhulu* (9) ; *Lakshmi Narasimha Rao v. Sitaramaswami* (10) ; *Venkata Narasimha v. Subba Reddi* (11) ;

(1) (1914) I. L. R. 39 M. 21.
(2) (1913) 24 Mad. L. J. 659.
(3) (1914) I. L. R. 38 M. 843.
(4) (1867) 4 Bom. H. C.
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(5) 6 Bom. H. C. (A.C.J.) 191.

(6) I. L. R. 1 B. 523.
(7) (1882) I. L. R. 6 B. 598.
(8) I. L. R. 29 B. 415.
(9) (1906) 16 Mad. L. J. 433.
(10) (1913) 24 Mad. L. J. 288.
(11) (1913) 24 Mad. L. J. 655.

Venkata Sastrulu v. Sitaramudu. (1) A cultivating tenant in Madras is prima facie the owner of the kudivaram: *Venkatana-rasimha Naidu v. Dandamudi Kotryya* (2); *Checkati Zamindar v. Ramasooru*. (3) The ancient rulers were not owners of the soil, but had a right only to the royal share of the produce: Mitra, "Land Law of Bengal" (Tagore Lecture, 1895), pp. 6, 22, 24; B. H. Baden-Powell, "Village Communities in India," ch. 5, ss. 2, 3; so also as to rajas in the Northern Circars: Fifth Report, vol. 2, pp. 2, 3, 6, 8, 11, 12, 14. The word "land" as used in Madras Regulation XXXI. of 1802, in the Report of the Inam Commission, and in the title-deed issued by it, does not mean the land itself as distinguished from the revenue out of the land. The inam grants regranted by the Inam Commission were grants of revenue: Inam Commission Report, Appx., p. xiii. It cannot properly be inferred that the land was uncultivated at the date of the grant; so far back as the evidence extended it was under raiyats. It was found as a fact that the land was zaraiti land. The fact that the grant was to Brahmins, who moreover appear to have resided elsewhere prior to 1845, strongly supports the view that the kudivaram was not granted. The kudivaram right did not come to an end upon the land being temporarily unoccupied, but was merely in abeyance. The right exists until taken away by transfer or succession; it cannot be acquired by an implied surrender: *Zamindar of Chellapalli v. Somaya* (4); ss. 10, 62, of the Act. [Reference was also made to the preambles to Madras Acts IV. of 1862 and VIII. of 1869, and to Madras Act VIII. of 1865, passim.]

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July 1. The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is a consolidated appeal from three decrees dated October 9, 1913, of the High Court at Madras, which affirmed decrees dated March 4, 1912, of the District Judge of Kistna, by which decrees dated April 18, 1911, of the Additional District Munsif of Masulipatam were set aside and the plaintiffs' suits were dismissed.

The suits in which these appeals have arisen were brought on

(1) (1914) I. L. R. 38 M. 891.

(3) (1900) I. L. R. 23 M. 318.

(2) (1897) I. L. R. 20 M. 299.

(4) (1914) I. L. R. 39 M. 341.

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July 10, 1909, in the Court of the District Munsif of Gudivada, and were suits of ejectment from agricultural lands situate within the agraharam village of Korragunta in the Northern Circars of the Presidency of Madras. The plaintiffs are inamdars of the village, holding under an inam grant of 1373 from a Reddi king of the district. The defendants are agricultural tenants who, or whose predecessors in title, at various times within very recent years and before July, 1906, were respectively let into possession by the inamdars under agreements for terms, which expired in each case before the suits of ejectment were brought. By these documents of tenancy the defendants or their predecessors in title agreed with the inamdars to quit possession of their holdings on the determination of the term for which the lands were let to them, and without claiming any zeroyati right in the lands.

In their written statements the defendants alleged that the agraharam village is an estate within the meaning of s. 3 of Act I. of 1908 (the Madras Estates Land Act, 1908), and in the alternative, and if the agraharam is not an estate within the meaning of the Act, then the defendants alleged in their written statements that they or their predecessors in the holdings had been cultivating the lands long before the formation of the agraharam, had acquired permanent rights of occupancy in the lands, and had enjoyed the lands with such rights to the present time. It was denied that the defendants held the lands for temporary terms as alleged in the complaints, and it was stated that if it were proved that agreements of tenancy had been executed by which the lands were to be held for terms and were to be quitted on the expiration of the terms it was not admitted that such documents were executed willingly by the defendants or their predecessors or with any knowledge of their provisions. If the last statement meant anything it must have meant that the inamdars had by fraud and the exercise of undue influence procured the execution by the defendants or their predecessors of the agreements of tenancy under which the defendants held the lands occupied by them. It may be mentioned at once that no evidence to suggest that there was any foundation of truth for that statement has been brought to the attention of their Lordships, and it may be dismissed from consideration as unfounded.

If the lands from which the inamdars are seeking to eject the

defendants are part of an estate within the meaning of s. 3, sub-s. 2 (*d*), of the Madras Estates Land Act, 1908 (Act I. of 1908), as the defendants allege, the civil Court had no jurisdiction to entertain the suits. The Munsif, who tried the suits, found on the evidence that the agra-haram village in question was not an estate within the meaning of the Act, and, finding the other issues in favour of the plaintiffs, made a decree of ejectment and for mesne profits in each suit. The District Judge on appeal decided that the agra-haram village was an estate within the meaning of s. 3, sub-s. 2 (*d*), of the Act, and dismissed the suits. The High Court on appeal directed that the plaint in each case should be returned to the plaintiff in order that it might be presented to the Court of Revenue. It is from these decrees of the High Court that this consolidated appeal has been brought.

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As the decision of this appeal mainly depends on the question as to whether the agra-haram village is or is not an estate within the meaning of s. 3, sub-s. 2 (*d*), of the Act, it is necessary to see how an estate for the purpose of the Act is thereby defined. Clauses (*a*), (*b*), (*c*), and (*e*) of s. 3, sub-s. 2, do not apply in this case, and need not be referred to. Sect. 3, so far as it is applicable here, is as follows: "In this Act, unless there is something repugnant in the subject or context: (2.) 'Estate' means (*d*) Any village of which the land revenue alone has been granted in inam to a person not owing the kudivaram thereof, provided that the grant has been confirmed or recognised by the British Government, or any separated part of such village;"

The term "kudivaram" is not defined in the Act. It is a Tamil word, and literally signifies a cultivator's share in the produce of land held by him, as distinguished from the landlord's share in the produce of the land received by him as rent. The landlord's share is sometimes designated "melvaram." The "kudivaram interest," an expression occurring in s. 8 of the Act, is apparently understood by the High Court at Madras as meaning a right to occupy land permanently.

The grant of the village by the Reddi king to the predecessor in title of the plaintiffs has not been produced. It would be unreasonable to expect that at this long distance of time it is still in existence. But that grant has been recognized and confirmed by the British

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Government, and the question is, was it a grant of the revenue only of the village, or was it a grant of the proprietary right in the village, that is, of the soil of the village? If it was a grant merely of the revenue obtainable from the village, the village is an estate within the meaning of the Act. On the other hand, if the grant included the soil of the village, the village is not an estate within the meaning of the Act, and the decree of the Munsif was right and should not have been set aside.

It has been contended on behalf of the respondents that in the times when the Reddi kings ruled in this district the ownership of the soil of land in India was not in the sovereign or ruler, and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator. Upon that assumption it was contended that the inam grant of 1373 could have been only a grant of the king's share in the produce of the soil, that is, that the grant was a grant of land revenue alone and did not include the kudivaram. That is an assumption which no Court is entitled to make, and in support of which there is, so far as their Lordships are aware, no reliable evidence. The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them; indeed, that fact would support the contrary assumption, that the soil was vested in the rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which was not a fixed and invariable share, but depended on the will of the rulers.

The assumption contended for on behalf of the respondents was not recognized in Regulation XXXI. of 1802. The opening words of that Regulation are instructive; it is there recited: "Whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description; and whereas, consistently with that principle, all alienations of land, except by the consent and authority of the ruling power, are violations of that right; but whereas considerable portions of land have been alienated by the unauthorised encroachments of the present possessors, by the

clandestine collusion of local officers, or by other fraudulent means ; and whereas the permanent settlement of the land-tax has been made exclusive of alienated lands of every description ; it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshahie or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government ; wherefore the following rules are enacted for that purpose."

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By that Regulation all grants for holding lands exempt from the payment of revenue made previously to February 26, 1768, in the Northern Circars shall be deemed to be valid, "provided that such lands may not have escheated to the State, or may not have been resumed and assessed for the public revenue since the period of those dates respectively ; and provided also that the present incumbents or their ancestors did obtain and hold actual possession of the said lands previously to the dates hereinbefore specified." The date thereinbefore specified, so far as the Northern Circars were concerned, was February 26, 1768.

By s. 15 of Regulation XXXI. of 1802 it was enacted that a register should be kept in each zillah of the lands held exempt from the payment of revenue previously, in the case of the Northern Circars, to February 26, 1768, and that the registers should specify the denomination of each grant or sanad, the names of the original grantors or grantees, and the names of the present possessors, with other particulars. The earliest of such registers from which an extract was put in evidence in these suits was Mr. Oakes' inam register. It appears from Mr. Oakes' inam register that the whole of the agraharam village of Korragunta was granted by Sri Madana Vema Reddi to Ivaturi Naganaradhyulu, and had been enjoyed by his successors in title for 429 years. That entry in Mr. Oakes' inam register affords, in their Lordships' opinion, conclusive evidence that the grant of the agraharam village by the Reddi king was a grant not only of the revenue but of the soil of the village, and that conclusion is supported by the dumbalas which have been put in evidence in these suits, and it is also supported by the reliable evidence in these suits showing how the inamdars dealt with the lands of the village. It is not proved, nor is there any evidence to

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suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise.

By Act VIII. of 1865 (Madras) it was enacted that inamdars and other landholders should enter into written agreements with their tenants, the engagement of the landowner being termed puttah and those of the tenant being termed muchilka. The puttah should contain, amongst other things, "all other special terms by which it is intended the parties shall be bound." The muchilka should, at the option of the landholder, be a counterpart of the puttah, or a simple engagement to hold according to the terms of the puttah. By the muchilkas which were executed by the defendants respectively or their predecessors in title the term for which the lands were let to them was specified; it was admitted that they held no zeroyati rights, and they agreed to quit the lands at the end of their term. All these muchilkas were made before the coming into force of Act I. of 1908, and it has not been proved that when these tenancy agreements were entered into, and the defendants or their predecessors in title were let into possession under them, any of the lands were, or had been, held by a raiyat with a permanent right of occupancy.

The District Judge in setting aside the decrees of the Munsif and dismissing the suits, and the learned judges of the High Court in the decrees which they made, acted upon what they conceived to be a presumption of law, deduced by them from some decisions of the High Court at Madras and of the High Court at Bombay, to the effect that in the case of an inamdar it should be presumed, in the absence of the inam grant under which he held, that the grant was of the royal share of the revenue only, and they cited the decisions upon which they relied as authorities. Some of those decisions to which they referred do not, upon an examination of them, support the opinions of those judges as to the presumption which they applied in these suits. In their Lordships' opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had.

Their Lordships will humbly advise His Majesty that this

consolidated appeal should be allowed with costs ; that the decrees of the District Judge and of the High Court should be set aside with costs ; and that the decrees of the Munsif should be restored and affirmed.

Solicitor for appellants : *Douglas Grant*.

Solicitors for respondents : *Barrow, Rogers & Nevill*.

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GAURISHANKAR BALMUKUND APPELLANT ;
AND
CHINNUMAYA AND OTHERS. . . . RESPONDENTS.

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ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

Execution—Transfer to Collector—Mortgage by Judgment Debtor—Invalidity—Code of Civil Procedure (Act XIV. of 1882), s. 325-A.

When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under s. 320 of the Code of Civil Procedure, 1882, the effect of s. 325-A is that a mortgage of the property, or any part of it, made by the judgment debtor while the Collector can exercise the powers given to him by ss. 322 to 325 is absolutely void, and not merely void as against the Collector and those claiming under him.

Magniram Vithuram v. Bakubai (1912) I. L. R. 36 B. 510 disapproved.

Salu Bai v. Bajat Khan (1917) 13 Nagpur L. R. 130 approved.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner (April 26, 1913) varying a decree of the District Court of Amraoti.

The appellant in 1909 sued the respondents upon a mortgage of lands and two houses executed by the first respondent on July 22, 1892. The other respondents had acquired interests in the property not material to this report.

Prior to the date of the mortgage part of the land included in it had been ordered to be sold in execution of money decrees against the first respondent, and the execution of the decrees had been

* *Present*: LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

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transferred to the Collector under s. 320 of the Code of Civil Procedure, 1882. The execution of the decrees by the Collector under the provisions of ss. 320 to 325 was concluded in 1894.

The respondents pleaded, inter alia, that by reason of s. 325-A of the Code the first respondent was incompetent to execute the mortgage.

The additional District Judge held that the mortgage was void so far as it related to property included in that against which the decrees had been made ; he made a foreclosure decree confined to the mortgaged property not so included. His decree was subject to a condition arising out of facts not material to the present appeal.

Upon appeal to the Court of the Judicial Commissioner the decree was varied by omitting the condition above referred to, but in other respects was affirmed.

1918. June 13. *De Gruyther K.C.* and *Parikh* for the appellant. Sect. 325-A affords no defence as regards the residue of the property returned to the judgment debtor upon the conclusion of the execution proceedings. The section only avoids alienations as against the Collector and those claiming under him. That view is in accordance with *Magniram Vithuram v. Bakubai*. (1) The contrary view taken in the Central Provinces in *Murray v. Muratsingh* (2), in this case, and subsequently in *Salu Bai v. Bajat Khan* (3) is erroneous.

The respondents did not appear.

June 13. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. By s. 325-A of the Code of Civil Procedure (Act XIV. of 1882) it is provided that " so long as the Collector can exercise or perform in respect of the judgment debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease, or alienate such property or part except with the written permission of the Collector,

(1) I. L. R. 36 B. 510.

(2) (1907) 3 Nagpur L. R. 171.

(3) 13 Nagpur L. R. 130.

nor shall any civil Court issue any process against such property or part in execution of a decree for money."

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In the present case the two salient facts are simply these: That in 1891 the Collector of the district came, under the Act, into possession of the property in question; and that, secondly, while he was still in possession of that property a mortgage upon it was granted on July 22, 1892, by the judgment debtor. It is now sought to make that mortgage operative in the appellant's favour by reason of this. It is contended that s. 325-A is not to be read in the complete and operative sense natural to the words, that is to say, of incompetency to mortgage such property, but must be read with an implied limitation. The limitation suggested is that there still remained in the judgment debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's administration had ended. It is the fact that the Collector's regime has now ended, but it is also the fact that during his administration, namely, on July 22, 1892, the mortgage which is now founded upon was granted.

Their Lordships have been referred to authority upon this question. That which is founded on by the appellant particularly is the case of *Magniram Vithuram v. Bakubai*. (1) Their Lordships are of opinion that that case was erroneously decided. Upon the contrary, the case of *Murray v. Muratsingh* (2), referred to in the judgment under appeal, and the case which has been decided recently by the Full Bench of the Central Provinces in 13 Nagpur L. R. 130, are, in the opinion of the Board, proper decisions and sound in law.

In short, the sole point in this appeal is whether a declaration by statute that a judgment debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense which the words imply. It is not necessary to go into reasons for the statute, but if reasons were to be implied, it is manifest that a confusion of title of a somewhat extraordinary kind would arise if it was held that it was competent on the one hand for the judgment debtor to mortgage the residuary interest, so to speak, leaving, on the other hand, uncontrolled and unimpaired during the same time all those acts of administration by a Collector, which it is admitted

(1) I. L. R. 36 B. 510.

(2) 3 Nagpur L. R. 171.

J C in argument would be perfectly competent. The confusion resulting
1918 from such a situation is not hard to figure.

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Their Lordships content themselves with holding that the judgments of the Courts below on this point are right, and they will humbly advise His Majesty that the appeal should be disallowed. No other point was taken upon the appeal. The respondents not having appeared, there will be no order as to costs.

Solicitor for appellant : *E. Dalgado.*

J. C.* HARIHAR BANERJI AND OTHERS . . . APPELLANTS ;
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July 16. RAMSASHI ROY AND OTHERS. RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Landlord and Tenant—Notice to Quit—Test of Sufficiency—Service by registered Post—Transfer of Property Act (IV. of 1882), s. 106.

A notice to quit, though not strictly accurate or consistent in its statements, may be effective, and should be construed ut res magis valeat quam pereat. The test is, what would the notice mean to the tenant who is presumably conversant with the terms and circumstances of the tenancy.

A notice proved to have been properly directed and posted (especially if registered) is to be presumed to have reached the person to whom it is directed in the ordinary course of postal business, unless the contrary is proved. The fact that the receipt for a registered letter is signed on behalf of the addressee by a person who is not proved to have had authority from him to receive it is no evidence that the letter did not reach the addressee.

The appellants held certain lands consisting of 2 bighas 2½ cottahs, formerly in the possession of one N. R., paying an annual rent of Rs. 25 to the respondents. The respondents sent by registered post to each of the appellants a notice to quit, purporting to refer to lands standing in the name of N. R. of which the appellants were in possession, paying Rs. 25 yearly rent, but stating that the lands were 6 cottahs in extent. The receipts for the registered

* *Present*: LORD ATKINSON, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

letters were in some cases signed by the addressee and in some purported to be signed on his behalf. The appellants did not give evidence denying the receipt of the notices:—

Held, that the notices were effective notices to quit the entire holding, and that the service was in compliance with s. 106 of the Transfer of Property Act, 1882.

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APPEAL from a judgment and decree of the High Court (April 16, 1915) affirming a decree of the Subordinate Judge of Hooghly.

The suit was brought by the first group of respondents against the appellants and three limited companies (joined as pro forma respondents, in the Munsif's Court. The plaintiffs alleged that they were the owners of certain land in village Char Ramkrishtopur, known as jama Nidhi Ram, which was in possession of the appellants as their tenants from year to year at an annual rent of Rs. 25, and that the tenancy had been determined by a notice to quit at the end of the Bengali year 1317 (April 11, 1911). They claimed possession.

The appellants by their written statement admitted that the land in suit consisted of 2 bighas $2\frac{1}{2}$ cottahs and that they paid to the plaintiffs a yearly rent of Rs. 25; they, however, pleaded that they held the land in ancestral mokurari mourashi right; they also disputed the validity of the notice and its service.

The Munsif dismissed the suit, holding that the terms of the notice were insufficient and the service improper. The Subordinate Judge reversed the decision on both points and remanded the suit for trial, and the High Court, upon appeal, affirmed that decision. The only questions before their Lordships consequently were whether the notice to quit was sufficient and properly served.

The terms of the notice and the facts as to the service, which was by registered post, appear from the judgment of their Lordships.

With regard to the notice, it was admitted by the appellants that the 2 bighas $2\frac{1}{2}$ cottahs of land of which they were in possession, and for which they paid Rs. 25 rent to the plaintiffs, had formerly been in the possession of Nidhi Ram, referred to in the notice. They disputed the validity of the notice owing to the reference to 6 cottahs, and they denied that the boundaries stated were those of the land which they held. It appeared that the appellants had leased to the defendant No. 11 6 cottahs of the land; the respondents alleged

J. C. 1918 that the notice stated that 6 cottahs was the extent of the holding because it was so entered in their books.

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1918. June 7, 10, 11. *De Gruyther K.C.* and *Kenworthy Brown* for the appellants. The notice was not an effectual notice as to the holding having regard to the reference to 6 cottahs. It was deliberately given as to that part of the holding in order to embarrass the appellants in proving their title to mokurari rights in the whole. The service was insufficient under s. 106 of the Transfer of Property Act, 1882. [Reference as to service by registered post was made to *Jogendro v. Dwarka Nath*(1) and *Subadini v. Durga Charan Law*.(2)]

Branson and *Dube* for the respondents (being called on only as to the sufficiency of the notice). The appellants must have understood that the notice referred to the entire holding formerly in the possession of Nidhi Ram. Having regard to the authorities, it was a sufficient notice to quit.

[They were stopped.]

De Gruyther K.C. replied.

July 16. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal against a decree of the High Court of Judicature at Fort William, Bengal, dated April 16, 1915, which dismissed an appeal from the Subordinate Court of Hooghly, dated May 19, 1914.

The action out of which the appeal has arisen is one of ejectment, brought, not by owners or occupiers of land against persons trespassing upon it, but by landlords of a particular piece of land against their former tenants of the same to recover possession thereof on the ground that the tenancy of those tenants has been determined by an effective notice to quit duly served.

[The judgment referred at length to the proceedings upon a former suit brought by the first respondent against the appellants for arrears of rent in which Rs. 25 rent was stated by the plaintiff to issue from 6 cottahs held by the appellants, and the appellants admitted that they were in possession of 2 bighas 2½ cottahs formerly held by one Nidhi Ram, and to the pleadings in the present suit, and continued as follows:]

(1) (1888) I. L. R. 15 C. 681.

(2) (1900) I. L. R. 28 C. 118.

In their Lordships' view there is nothing whatever to show that the plaintiffs were actuated by a desire to play any trick or effect any fraudulent purpose in connection with the notice to quit or the ejectment suit consequent upon it, or to show that they did not serve the notice and institute the suit in the honest desire to exercise legitimately the rights which the law conferred upon them in reference to the possession and enjoyment of their own property.

If this were a case arising in England, the English authorities would therefore be applicable. It has not been suggested, and could not, their Lordships think, be successfully contended, that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants, presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed *ut res magis valeat quam pereat*. To take a few of the authorities out of many to illustrate these principles.

In *Doe v. Culliford* (1) the defendant went into possession of a house and an acre of land in the parish of Ilchester on August 4, 1821, as tenant to the plaintiff. On September 28, 1822, the plaintiff served upon the defendant a notice dated September 27, 1822, to quit the house and land "at Lady Day next or at the end of your current year." Acting on the above-mentioned principles, it was held to be a good notice to quit on Lady Day, 1823, i.e., March 25, 1823. Abbott C.J., in delivering judgment, said: "There is one rule of construction in cases of this nature, which is no less sound than ancient, namely, to give such a sense to ambiguous words as will effectuate the intention of the parties. Applying that rule to this case, it appears to me the words 'at the end of your current year,' may be understood to mean the end of the current year ending at the ensuing Lady Day." Bayley J. said: "We are to look at the intention of the landlord. When general language is

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(1) (1824) 4 Dow. & Ry. 248.

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used which is open to doubt, the rule is to make it sensible, not insensible. The state of the defendant's holding shows it to be clear that the landlord did not mean the year ending at Michaelmas Day. He could not intend to give notice to quit in two days, because that would be no notice whatever. By mentioning Lady Day next it is clear he meant to give a six months' notice, or such notice as the law requires. He intended to give an effective notice, and it is quite sufficient if the tenant understands what is meant." [Reference was also made to *Doe v. Smith* (1), followed and approved in *Wride v. Dyer*. (2)]

The case of *Doe v. Archer* (3) is very applicable to the present case. There a farm was leased for twenty-one years at a rent of 180*l.* per annum. The farm, as described in the lease, consisted of Town Barton and its several parcels described by name at a rent of 83*l.*, other closes named at rents of 5*l.* 5*s.* and 11*l.*, and the Shippon Barton and several parcels described by name at 86*l.* There was reserved to either party power to determine the lease at the end of fourteen years on giving two years' previous notice. It was held that a notice by the landlord to the tenant to "quit Town Barton, &c., agreeably to terms of the covenant between us on the expiration of the fourteen years of your term" was sufficient. Lord Ellenborough, in delivering judgment, said: "The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only: and so the notice in question must have been understood by the tenant. The notice to quit Town Barton, where the mansion was, meant the Town Barton cum sociis; especially with reference to the lease, which only gave him power to determine the tenancy as to the whole, which was let together." Le Blanc J. said: "There being no power under the lease to determine the tenancy as to part only, the notice to quit could have no operation at all unless taken, as it must have been intended, to apply to the whole." Bayley J. said: "We are to construe a notice to quit in such a way ut res magis valeat quam pereat."

In order to judge of what the notice to quit in this case conveyed to those of the principal defendants upon whom it was served it is

(1) (1836) 5 A. & E. 350.

(2) (1900) 1 Q. B. 23.

(3) (1811) 14 East, 245.

necessary by examination of the evidence given at the trial before the Munsif to ascertain what were the material facts in reference to the connection of those defendants with the lands in suit. [After an examination of the evidence the judgment continued :]

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In the face of this evidence it is not surprising that when the case came before the Subordinate Judge it is stated in his judgment that it was admitted on both sides that the defendants', i.e., the Banerjis', tenancy consisted of the holding of Nidhi Ram. It is not suggested that the knowledge of this fact was recently acquired by the principal defendants, and the sufficiency or insufficiency of the notice to quit must therefore be determined having regard to the fact that admittedly the principal defendants were, to their own knowledge, tenants of Nidhi Ram. In their written statement they do not deny this fact, but studiously evade admitting it, while they have given no evidence whatever to disprove it ; all these circumstances suggest that they were well aware who their predecessor in occupation was. It is almost impossible to believe that the counsel for the principal defendants would have omitted to confine his clients' admission to their state of knowledge subsequent to the service of the notice to quit if he could have honestly and truthfully done so.

Turning to the contents of the notice to quit, the material part of it is : " You are informed by this notice that Char Ramkrishtopur, pargana Boro, recorded in towzi Nos. 3994 and 3994A in the Collectorate of district Hooghly, within station Shibpur, is our zamindari. The bastu land, bounded as below, within the said char, is land, bearing a yearly jama of Rs. 25, standing in the name of the late Nidhi Ram. You have been in possession of the said land on payment of rent at the said rate and taking dakhilas in the name of the said Nidhi Ram as thika tenants at will of the said one jama only under us. Now it being necessary for us to take khas possession of all the lands comprised in the said jama, you are informed by this notice that you should vacate that land, by removing the huts, &c., that exist on the said land on or before the last day of the month of Chaitra of the current year 1317 B.S. We shall take khas possession of all the lands comprised in the said jama on the expiry of the said fixed time. In case we do not get khas possession of the said land on the expiry of the said time fixed,

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we shall take khas possession of that land by instituting a suit in proper Court against you, and you shall be liable for all damages.

"The 9th Assin, 1317 B.S. (1)

"SCHEDULE.—1 (one) plot of bastu land, about 6 cottahs in area, situate in village Char Ramkrishtopur, within station Sibpur, pargana Boro (6 cottahs). Boundaries:—North : Ramkrishtopur Ghat Road. West : jamai land of the late Thakurdas Banerji. South : jamai land of the late Bhuban Mohan Banerji. East : land included in the said towzi."

The question is what must that notice have conveyed to an ordinary reader, more especially to tenants who were aware, as the principal defendants have admitted, that they held Nidhi Ram's holding.

The notice begins by stating that the bastu lands, bounded as below within the char of Ramkrishtopur, are lands bearing yearly jama of Rs. 25 standing in the name of Nidhi Ram. It is then averred that the principal defendants have been in possession of these lands on payment of rent at the aforesaid rate, taking dakhilas in the name of the said Nidhi Ram, as thika tenants at will, of "the said one jama only under" the plaintiffs. It is then averred that it is necessary for the plaintiffs to take khas possession of all the lands comprised in the jama already mentioned. The principal defendants are then required to vacate that land, that is, all the land comprised in the aforesaid jama, before a day named, and they are informed that on the expiry of that time the plaintiffs will take possession of all the lands comprised in the aforesaid jama. If the boundaries alone were added it could not, their Lordships think, be successfully contended that the meaning of this notice to any ordinary reader was not that possession of the entire jama in the tenancy of the principal defendants, which has stood in the name of Nidhi Ram, and for which he and they paid a rent of Rs. 25 per annum, should be delivered up to the plaintiffs. To tenants who, like the principal defendants, were admittedly in possession of the entire jama and paid that rent, that must have been clear to demonstration, but it is contended that all this clearness is obscured by the statement in the schedule that the lands the possession of which is to be delivered up are one plot of bastu lands 6 cottahs in extent.

(1) September 26, 1910.

The principal defendants knew perfectly well that a plot of 6 cottahs in extent is only a fraction, one-sixth or one-seventh, of the lands in the entire jama; they must presumably have known the law that a notice requiring a tenant to quit only a portion of the holding of which he was tenant was bad and ineffective. But the presence of the words "6 cottahs" in the schedule, it was, in effect, contended, necessitates that the landlord should be presumed to have intended to serve a notice bad and ineffectual to his own knowledge rather than a valid and effectual one, and that the notice itself should be construed *ut res magis pereat quam valeat* instead of the contrary. No argument has been addressed to their Lordships and no authority produced to show that the principles of the above-recited English cases are inapplicable to Indian cases. From the very nature of a notice to quit, which is merely the formal expression of the landlord's will that the tenancy of his tenant shall terminate, it would *prima facie* appear that they are applicable. In addition it may well be that the description of the lands of the jama as *bastu* lands may refer to their condition as originally held by Nidhi Ram, and not to their condition after the defendants 8 and 9, had, during the years subsequent to the year 1905, built *pucca* buildings upon them, and defendant No. 11 had erected huts upon his 6 cottahs.

In their Lordships' view the erroneous statement of the contents of the jama does not predominate over the description given of it in the earlier portion of the notice to quit. They have not the slightest doubt that the principal defendants were perfectly well aware that the notice required the defendants, as the plaintiffs desired and intended that it should, to quit and deliver up possession of the entire jama for which they for years paid the rent of Rs. 25. If anything additional were needed to convince one that this was so it would be the evidence of the only witness examined for the defendants. He says not a word about the principal defendants and their predecessor having from time immemorial had ancestral *mokurari* rights in the property containing 2 bighas $2\frac{1}{2}$ cottahs bearing an annual rental of Rs. 25, not a word to the effect that although he got, as he admits, the notice to quit he did not understand that it referred to the whole jama for which Nidhi Ram formerly and the principal defendants in succession to him paid this

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rent of Rs. 25 per annum. Their Lordships are, therefore, clearly of opinion that the notice was a good notice to quit the holding in its entirety, whatever its area might be. What its actual area is can be determined at the trial, and the possession of that area can be recovered in these proceedings.

Next and lastly as to the service of the notice to quit. Sect. 106 of the Transfer of Property Act, 1882, only requires that such a notice should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence, or, if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. In the case of joint tenants, each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants: *Macartney v. Crick* (1); *Doe v. Watkins* (2); *Pollok v. Kelly*. (3)

It was proved and found that defendants Nos. 5, 6, and 7 are members of a joint Hindu family, and that of these No. 5 was duly served with a duplicate of the notice to quit. The mode of service adopted was this: Hira Lal Kar, the gomashtha of all the plaintiffs, who knew all the defendants and their addresses, sent to each by registered letter addressed to them at these addresses duplicates of the notice to quit signed by all the plaintiffs. For these notices he received receipts on the registration of them. The peon of the post office, who, the defendants' only witness admitted, knew all their houses, got from all of them receipts for the letters when delivered. These receipts were produced. [The receipts, examined in detail, purported in some cases to be signed by the addressee, and in some by some person on his behalf.] The Munsif held there was no proof of the service of the notice to quit on any of the defendants other than those numbered 1, 4, and 5. He seemed to be of opinion that a registered letter must be presumed to have been delivered to the person who signed on behalf of the addressee the receipt for it, but not to the addressee himself in the first instance

(1) (1805) 5 Esp. 196.

(2) (1806) 7 East, 551.

(3) (1856) 6 Ir. C. L. R. 367.

or at all, and that as there was no proof that the persons other than the addressees who so signed were the duly authorized agents of the addressees to receive these notices the proof of service was defective. Service of a notice upon or delivery to such an agent would be good service or delivery to the principal though in fact the notice was destroyed by the agent and never was seen or heard of by the principal : *Tanham v. Nicholson* (1); but it is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself, or that he cannot do so by the hand of another person, or that if another person does sign it on the addressee's behalf the presumption is that it never was delivered to the addressee himself mediately or immediately. For instance, if a servant in the addressee's house saw a notice handed in by the postman carried to the addressee and handed to him, that servant could certify that it was delivered to his master and could, if requested by the master, sign the receipt on the latter's behalf, though he was not the agent of the master authorized to take delivery on his, the master's, behalf.

The latest, clearest, and most conclusive authority upon the question of the sufficiency of the service or delivery of a notice to quit by post probably is the case of *Gresham House Estate Co. v. Rossa Grande Gold Mining Co.* (2) There the defendants, who were sued for rent, contended that they had, before the rent accrued due, terminated their tenancy by a notice to quit enclosed in a letter which they had put into the post correctly addressed to the plaintiffs, and which, if delivered in due course, would have been received in time to determine the tenancy. The plaintiffs called evidence to show the letter had never been received. The learned judge presiding at the trial directed the jury that a notice to quit enclosed in a letter sent through the post was *prima facie* evidence that it had been received, and left to the jury the question whether it had, in fact, been received or not. The jury found it had been received. On a motion for a new trial on the ground of misdirection, the Court, consisting of Cockburn C.J., Blackburn, Mellor, and Hannen JJ., held that if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to

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(1) (1872) L. R. 5 H. L. 561.

(2) (1870) W. N. 119.

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the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted, but strengthened, by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.

The only one of the defendants who appeared as a witness admitted he had received through the post office the notice addressed to him. None of the other defendants appeared as witnesses to deny that they had received the notices properly addressed to them and properly posted. In their Lordships' view the evidence of delivery of the notices to quit to all the principal defendants was, under these circumstances, adequately and sufficiently proved, and constituted good service of them within the meaning of s. 106 of the Transfer of Property Act, 1882. They are therefore of opinion that the appeal fails upon both the points raised for decision and should be dismissed, and will humbly advise His Majesty accordingly. As they think that the erroneous mode in which the plaintiffs shaped their claims in the years 1906, 1907, and 1908 in the letters and litigation already referred to may have misled the defendants and brought about this appeal, they think the parties should be left to abide their own costs incurred in it.

Solicitors for appellants : *Rehder & Higgs.*

Solicitors for respondents : *Watkins & Hunter.*

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[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Bombay Municipality—Improvement Trustees—Streets—Vesting—Building Line—Compensation—Interest—City of Bombay Municipal Act (Bombay Act III. of 1888), ss. 300, 301—City of Bombay Improvement Act (Bombay Act IV. of 1898), ss. 41, 45.

When the Trustees for the Improvement of the City of Bombay, constituted by Bombay Act IV. of 1898, having given notice under s. 41 of that Act to the Municipal Commissioner that an existing street is required by them under a new street scheme, construct the new street with a building line set forward from the old building line, the strip of land between the two building lines does not vest in the trustees. The vesting in the trustees under the notice is co-extensive with the revesting under s. 45, sub-s. 2.

When under s. 300, sub-s. 1, of the City of Bombay Municipal Act (Bombay Act III. of 1888) premises are compulsorily ordered to be set forward to the building line, the corporation is not entitled under the Act to compensation from the owner of the premises for land which prior to the order vested in the corporation, but which will be covered by the premises as ordered to be set forward.

Unless there is something in the contract between the parties which necessarily imports otherwise, the date when one party enters into possession of the property of another is the date from which interest upon the unpaid price should run.

CONSOLIDATED APPEALS from two decrees of the High Court (April 16, 1916), the first affirming a decree, and the second varying a decree, of Davar J. (October 15, 1914).

The consolidated appeals were in two suits in the High Court arising out of the rebuilding of the appellant's premises at the corner of Princess Street and Kalbadevi Road, in the city of Bombay. Upon the rebuilding the premises had been set forward in Princess Street and set back in Kalbadevi Road so as to conform with the building lines, and as provided by an order made by the Municipal

* *Present:* LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, MR. AMEER ALI, and SIR WALTER PHILLIMORE, BART.

J. C. Commissioner under ss. 298 and 300 of the City of Bombay Municipal Act, 1888.
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The first suit was instituted by the mother and guardian of the appellant, who was a minor at that time, against the respondent the Municipal Commissioner to recover compensation in respect of the strip of land covered by the original premises in Kalbadevi Road in front of the building line.

The second suit was instituted by the respondents the Trustees for the Improvement of the City of Bombay against the appellant. The trustees alleged that the land in Princess Street over which the premises had been erected upon the rebuilding was their property, and they claimed possession.

The strips of land in question in the two suits are for convenience referred to respectively as the set-back land and the set-forward land.

The suits were heard successively by Davar J. In the first he decreed the appellant compensation at Rs. 200 per square yard, but upon the view which he took of the appellant's conduct he refused to allow him interest or the costs. In the second suit, to which the respondent Commissioner was joined as a third party, the learned judge held that the set-forward land was vested in the respondent trustees, and that they were entitled to eject the appellant. He made a decree for possession, and dismissed the appellant's claim against the respondent Commissioner as third party.

The appellant appealed from the first decree so far as it did not give him interest and costs, and from the whole of the second decree.

The learned judges (the Chief Justice and Batchelor J.) affirmed the first decree, and varied the second decree only by ordering that the appellant should be evicted unless by May 15, 1915, he paid to the respondent trustees compensation at Rs. 200 per square yard for the set-forward land.

1918. June 13, 14, 17, 18. *P. O. Lawrence K.C.* and *E. B. Raikes* for the appellant. In the first suit the appellant was entitled upon the principles applied under the Lands Clauses Act to interest from the date when the corporation obtained possession of the set-back

land. The corporation, not having appealed from the decree for compensation, cannot contend that the claim should have been made in the Small Causes Court. In the second suit the trustees were not entitled to sue in ejectment. The appellant was owner of the land *ad medium filum* of the street; the vesting in the corporation under s. 289 of the Municipal Act was merely for the purposes of the Act and did not affect the freehold interest: *Bombay Corporation v. Great Indian Peninsula Ry.* (1) But even if the freehold of the street vested in the corporation, the effect of the notice under s. 41 of Bombay Act IV. of 1893 was merely to vest the land in the trustees for the purposes of that Act: *Rolls v. Vestry of St. George* (2); *City of London Land Tax Commissioners v. Central London Ry.* (3) Upon the trustees abandoning their street scheme, which was before the appellant commenced to rebuild, the set-forward land, if it ever vested in the trustees, revested in the corporation, or at any rate the trustees ceased to have such an interest as would support the action. By the order of the corporation under s. 300 the appellant was not only authorized, but required under penalties, to rebuild upon the land. Only the corporation had power to make the set-forward order, and it must be taken as made on behalf of the trustees as well as of the corporation. The Municipal Act gives no right to the corporation by s. 301 or otherwise to recover compensation when premises upon rebuilding or ordered to be set forward to the building line; sub-s. 3 impliedly excludes the right.

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Hon. F. Russell K.C. and *Sheldon* for the respondents. In the first suit the appellant was not entitled to interest. Where there has been, as there was in this case, a long delay in taking proceedings, interest is not awarded unless the delay was due to the fault of the persons liable: *Caledonian Ry. Co. v. Carmichael*. (4) There was no debt until the amount of compensation was settled by the decree. As to the second suit, the effect of s. 289 was to vest the streets absolutely in the corporation. For the purposes of the judgment in *Bombay Corporation v. Great Indian Peninsula Ry.* (5) it was immaterial whether the vesting was absolute or merely

(1) (1916) L. R. 43 I. A. 310,
314.

(2) (1880) 14 Ch. D. 785, 797.

(3) [1913] A. C. 364, 379.

(4) (1870) L. R. 2 H. L. Sc. 56.

(5) L. R. 43 I. A. 310.

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sub modo, and no decision of that question was intended to be given. The question whether a statute vesting land in a public authority vests the freehold depends upon the language of the statute and the purpose contemplated: *Rolls v. Vestry of St. George*. (1) Sect. 290 of the Municipal Act, which gives the corporation a power of sale, makes it clear that the streets vested absolutely in them. So, too, the Improvement Act vested absolutely in the trustees streets as to which they gave notice under s. 41; under s. 63 they had power to let or sell. They had paid the corporation for the land as provided by s. 41A. The re-vesting in the corporation under s. 45 was only as to the street actually constructed; the land which had not been used for the new street remained vested in the trustees. The improvement board of trustees is a public body of a permanent character with power to hold land as owners. The appellant in substance was permitted, not required, to build upon the set-forward land; the set-forward was at his request and for his benefit. Under s. 301, sub-s. 2, of the Municipal Act the corporation were entitled to set off, against compensation payable to the appellant, the value of the set forward land. But that the appellant's agents led the corporation to understand that they agreed to the compensation being payable upon that basis, it would have been made a condition of the conveyance under s. 301, sub-s. 3. The appellant is estopped from claiming to hold the land free from any condition.

P. O. Lawrence K. C., in reply, referred to *In re Duke of Northumberland and Tynemouth Corporation* (2) on the right to interest.

July 26. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. These are consolidated appeals from two decrees of the High Court of Judicature at Bombay dated April 16, 1916, confirming substantially decrees dated October 15, 1914, in two suits which were instituted in its original jurisdiction.

The object of the suit by the respondents, the 'Trustees for the Improvement of the City of Bombay, against the appellant is for a declaration of those plaintiffs' property in a certain piece of land, and for the ejectment therefrom of the defendant, the present

(1) 14 Ch. D. 785.

(2) [1909] 2 K. B. 374.

appellant, and for delivery forthwith by him of possession thereof. The land has been built over. The issue raised is serious, affecting as it may do many other frontage sites in Bombay.

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The position of the block of property (of which the piece just mentioned forms a part) is as follows: It is a corner site having one frontage to the east—Kalbadevi Road, the other frontage to the north—to Princess Street, in the city of Bombay. Princess Street is made on the site of what was formerly Lohar Chawl Street. The piece of land from which the appellant is sought to be ejected faces Princess Street. The primary question for the consideration of the Board is, who owns that piece of land?

The appellant, Ratanlal Choonilal Panalal, is the proprietor of the corner block of ground. In the year 1906 his mother and natural guardian, he being then an infant of nine years of age, wished to develop the property by erecting certain new buildings thereon. Steps were accordingly taken to give the notices required in the circumstances to the corporation. No question arises as to the regularity of these proceedings. Building lines had been drawn up for the streets of Bombay by the municipal authorities under statutory powers, and in the course of disposing of the application to put down the new buildings on the corner block in question orders or requirements were issued that these lines should be conformed to.

With regard to the east frontage, namely, that to Kalbadevi Road, the order required that the line of new buildings to be erected should be set back. This was done, and involved the sacrifice by the owner of 28'41 square yards of site. It is admitted by the respondents that the corporation must pay for that ground under the Bombay Act No. III. of 1888.

With regard to the frontage to Princess Street, formerly Lohar Chawl Street, it was required of the appellant, not that he should set back his building line, but that that line should be carried forward. This also was done and the buildings were erected, according in all respects to the requirements made and to plans which were submitted to and sanctioned by both the authorities, namely, the corporation and the improvement board. Details of these points need not be given; the real facts are admitted.

The attitude of the corporation appears to be that the one of these transactions is a legitimate set-off in law against the other.

ADVOCATE

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In this they are supported by the Bombay improvement board, which puts forward the claim that it, under its Act of constitution, is the owner of that projecting piece of ground facing Princess Street, which had to be, so to speak, absorbed into the block so as to comply with the throwing forward of the building line. This would seem to be an answer to the plea of set-off, as the debt due by the corporation could not be compensated in respect of a claim by the improvement board. But these two authorities are hand and glove, and this not improperly. It is in the public interest that they should work together, if this can be done in conformity with the various statutes. The mode of co-operation adopted in the present case was somewhat unusual. The trustees, claiming as owners, made a demand to be paid a price for the site fronting Princess Street over which the appellant had been forced to throw his building forward so as to conform with the required building line. At first there was an inclination to consider that demand; but differences, delays and further inquiry ensued, and finally the plaintiff refused the demand. Thereupon the trustees instituted their suit, craving, *inter alia*, ejectment of the plaintiff. This, if decreed, would of course mean the total destruction of a large and important section of the appellant's buildings, all erected according to plan and by the sanction and with the knowledge of the corporation and the trustees as stated.

This situation involves an investigation as to the important and fundamental question already stated, namely, who owns this piece of ground? Unless the improvement board can establish its ownership of the site of the projection in question, namely, that facing Princess Street, it cannot of course have any title to eject the plaintiff therefrom.

By the City of Bombay Improvement Act (Bombay Act IV. of 1898) the respondents as a board of trustees were constituted. Among its powers are those of making street schemes, and by s. 1 it is provided that the street scheme "shall within the limits of the area comprised in the scheme provide for (a) the acquisition of any land which will in the opinion of the board be necessary for or affected by the execution of the scheme; (b) relaying out all or any land including the construction of buildings and the formation and alteration of streets."

It is admitted that Lohar Chawl Street was in 1905 vested in the corporation. The trustees state in their plaint that on January 17, 1905, they intimated to the corporation that that street so vested in it was required by the plaintiff to form part of Princess Street, a street which was then about to be formed by the board under a scheme to be carried out by it as provided for by the City of Bombay Improvement Act. The meaning of this is that, to begin with, the board took over Lohar Chawl Street just as it found it.

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This was two years before the appellant began to build. In point of fact, he began in February, 1907 ; and he began upon lines prescribed by the corporation, and known and approved by the trustees as so prescribed. His building line did de facto project over the old line of Lohar Chawl Street and come forward to a new line arranged by the authorities as that upon which Princess Street was to run.

How had this change from the old frontage of Lohar Chawl Street to a new frontage for Princess Street occurred ? It had occurred for the simplest of all reasons, namely, that between 1905 and 1907 the board, in working out its scheme of reconstruction, discovered that it would be more advantageous to run the line of Princess Street so as to carry it forward at certain portions, of which the bit of site in question is one, and to carry it back at other portions. The board accordingly communicated that new Princess Street line to the corporation, sending a plan showing exactly the new and forward regular building line. To that line the corporation officers duly worked, and to that line the appellant was ordered, most properly, to conform. And, most properly, he did so. In obedience to this requirement the buildings were erected, and they conformed exactly with the forward frontage demanded. As Mr. Delves, the board's deputy land manager, testifies, " The board's officers knew that the defendant's building was being constructed on this set-forward land. . . . The board took no objection to the construction of the defendant's building while the building work was going on. . . . The board never claimed, nor thought of claiming, the set-forward land back from the defendant till the municipality asked us to do so."

It was in these circumstances that the suit for ejectment of the

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plaintiff was brought by the trustees, upon the averment that in 1907 his mother "unlawfully entered into and took possession thereof." This is how the matter stands in fact. How it stands in law depends upon the claim which the board put forward and ask to be judicially declared, that the piece of land "is the property of and vested in it." This claim in law will now be examined.

As stated, the history of the buildings has been that they have been erected to conform to requirement upon the new and forward Princess Street line, and not upon the old Lohar Chawl Street line. The question is, what is the fate of the property between these two lines? The trustees maintain that when they gave their original intimation to acquire up to the Lohar Chawl Street line the effect of that was to vest in the trustees all the ground so embraced, that is to say, not only the ground on which Princess Street was in fact formed, but also the strips on which it was not formed. The municipality for the purposes of this litigation appears to acquiesce in this view, and the learned judges in the Courts below agree. In the opinion of their Lordships this is a mistake.

The effect of the mistake would be to produce in the city of Bombay an extraordinary situation. Many properties fronting ordinary streets belonging to the corporation would find themselves frontaging property belonging to the trustees by virtue, it is contended, of the mere intimation that the trustees required the old street for making the new. But when the new street came to be constructed it would be within the power of the board to throw the new and actual building line forward, with the result that not only would it become the owner of the street as ultimately formed, but it would also become de facto the owner of all the strips between the line of the old street and the line of the new. All the frontagers so situated in Bombay would consequently and de jure be put into the position of owning hinterland instead of frontage land and be subject to the disadvantages for commercial and other purposes of all that this implies. It was contended by the learned counsel for the respondents that legally and logically the trustees, being the owners of these strips, could do with them what they liked with the assent of the corporation—that is to say, they could let them or

build upon them as their trust property, thus "blinding" all the old frontagers' sites and buildings.

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It is accordingly necessary to see what actually is the true extent of the powers of the trustees in this matter. These are contained in the City of Bombay Municipal Act (III. of 1888, Bombay), which gave certain powers to the corporation, which powers were by s. 42 of Bombay Act IV. of 1898 declared to "apply to streets or parts thereof which may become vested in the board under this Act during such period as the same shall respectively remain so vested and for the purposes of this Act." The language of that section reflects pretty clearly the main object of the Act, which was to set up with sufficient powers a street-making authority, and, when its function as such was expired, to have the street which had been reconstructed or made by the board thereupon handed back to the corporation.

By s. 41 it was provided as follows: "Whenever under any improvement or street scheme the whole or any part of an existing public street or other land vested in the corporation is included in the site of any part of a street to be formed, altered, widened, diverted, raised, rearranged, or reconstructed by the board, the board shall give notice to the Commissioner that the whole, or a part as the case may be, of such existing street or other land (hereinafter called the 'part required') is required by them as part of a street to be dealt with as aforesaid, and the part required shall thereupon, subject to the provisions of sub-s. 2 of s. 45, be vested in the board; provided that nothing in this section contained shall be deemed to affect the rights or powers of any municipal authority under chapters IX. and X. respectively of the Municipal Act in or over any municipal drain or waterwork."

By s. 45, sub-s. 2, it was provided that "the Commissioner shall on being satisfied that any street formed by the board has been duly levelled, paved," &c., and drained and lighted, and, in short, thoroughly completed and the work of the board as a street-making authority finished, then "such street shall thereupon vest or re-vest, as the case may be, in the corporation, and the corporation shall thenceforward maintain, keep in repair, light, and cleanse such street."

Not a word is said in these sections to indicate either (1.) that

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the building line of the street must, once indicated, remain by reason of that original indication, and not be open to change or putting forward should experience suggest this to be for the best ; nor (2.) is anything said to indicate that the street taken over " to be formed " is anything different in dimensions from the street to be handed back when formed.

Upon the first point the Bombay Act No. III., and no doubt the practice of the Municipality thereunder, confute it. The section referred to is as follows : " 297.—(1.) The Commissioner may—(a) Prescribe a line on each side of any public street ; (b) From time to time, but subject in each case to his receiving the authority of the corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof. . . . (2.) The line for the time being prescribed shall be called ' the regular line of the street.' " It cannot be suggested that the board were, as compared with the municipality, prohibited from " prescribing a fresh line."

As to the second point, their Lordships are clearly of opinion that these two sections, the one as to taking over a street " to be formed " and the other as to handing the formed street back, are correlative to each other. The section does not mean merely " intended to be formed " when a notice is made, but it refers to that ground and no other which is used as a street and for the purposes thereof, and that no transfer from the Municipality is effected to the board of anything else. If, therefore, a line originally indicated is changed the line of the street to be formed is changed and the whole transaction is modified in this sensible and practical manner. It is only in this way that the word " revest " in the corporation becomes intelligible. What is to revest in the municipality is just that which when formed as a street had been the subject of that interim divesting to the board as the street-forming authority. And the whole theory of the trustees' case—namely, that in virtue of a notice taking over from the municipality a certain street of Bombay to be formed as a new street by the board thereby vested the whole of the old street in it, although a strip of the old street never was formed as a new street—falls to the ground.

The board's action was, in conjunction with that of the officers of the municipality, much more reasonable, namely, that when the

line of the new street was made the frontager was required to put forward his building to conform to it. And this, in the opinion of their Lordships, was not only reasonable in practice, but was correct in law and in accordance with a sound construction of the Acts.

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What then happened to the strip of old street which was never "formed" into the new street? The answer is that nothing happened to it. It remained under the jurisdiction, and in all respects as before the property of the municipality. To it as such accordingly when the frontager was required to put forward his buildings over it s. 301, sub-s. 3, of the Municipal Act of 1888 expressly applies. That sub-section is as follows: "If the additional land which will be included in the premises of any person required or permitted under the last preceding section to set forward a building belongs to the corporation, the order or permission of the Commissioner to set forward the building shall be a sufficient conveyance to the said owner of the said land; and the terms and conditions of the conveyance shall be set forth in the said order or permission."

The result is plain: the projection, that is to say, the site between the old street line and the new, ex adverso, of the appellant's property, became his in ownership. It is his now. The title of the trustees to it fails, and with it fails the suit, whether for declaration or ejectment.

There remains to be dealt with the suit by the appellant for the price of the ground taken from him as the result of the compulsory throwing back of his line of building facing Kalbadevi Road and the absorption into that road by the municipality of a portion of the appellant's ground. Payment for this has been decreed and the decree in this respect will stand. But two further questions arise in regard to that suit, namely, as to costs and as to interest on the price.

Costs were refused on account of the view entertained by the Courts below as to the conduct of the appellant in refusing to set-off against that price a price for the Princess Street projection. The question of whether a price is exigible for that projection does not arise directly as matter of suit; but it is necessary to express an opinion upon it because a determination upon it will govern the questions both of costs and of interest.

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In the opinion of the Board, while the Act makes provision for the compulsory expropriation of an owner, it makes no provision whatever for a payment by the owner in respect of what may be termed compulsory impropriation. Some reasons occur for the view that it might have been so, and some occur for an opposite view. These were for the Legislature. What the Legislature has done, and all that it has done upon that subject, is contained in s. 310, sub-s. 2, of the Bombay Municipal Act. It is as follows: "If, in consequence of any order to set forward a building made by the Commissioner, . . . the owner of such building sustains any loss or damage, compensation shall be paid to him by the Commissioner for such loss or damage."

The loss or damage may be easily figured: the compulsory projection may involve most serious cost; the whole foundations of the old building may be rendered useless, and the cost of new may be heavy; alterations of plans, levels, elevations, and the like might all be involved in particular cases, and, in short, the Legislature has recognized, not a price to be paid by the owner for compulsory impropriation, but damages to the owner if such can be qualified in consequence thereof. Their Lordships in these circumstances cannot look upon the suggested right in the trustees or the corporation to receive a compulsory price for the Princess Street proprietors to be justified by the Act. Accordingly, the alleged right or duty of set-off fails.

In these circumstances the plaintiff and his advisers were, of course, entirely warranted in refusing to concede the set-off claimed. It was not, in the opinion of their Lordships, justified by law. This renders it unnecessary to deal in detail with certain derogatory observations made more particularly by Davar J., culminating in his assertion that the appellant's conduct "has been conspicuously unscrupulous and transparently dishonest." When it is remembered that in all the most important of these transactions the appellant was an infant nine years of age, the suggestion of such precocity in wickedness in Bombay seems sufficiently answered. But it may suffice to say that, hard to bear as these accusations must have been, they do not appear to their Lordships to have been in any respect warranted by the facts or by the law of either case. In the opinion of their Lordships the position taken up by the appellant in these

suits has been completely justified, and was throughout in accordance with law. Costs will accordingly follow the event.

On the point of interest, on the price payable by the municipality, two matters were agreed at the Bar. In the first place the rate of interest, should it be allowed, was arranged at six per cent. In the second place, it was agreed that the corporation has been in possession of the ground since June 30, 1909.

Their Lordships are of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports otherwise, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it. See especially Sir W. Grant's judgment in *Fludyer v. Cocker* (1) and *Greenock Harbour Trustees v. Glasgow and South Western Ry.* (2), in which the judgment of Lord Cowan in *In re Stirling and Dunfermline Ry. Co.* (3) was adopted; see also *Birch v. Joy* (4) in the judgment of Lord St. Leonards.

Their Lordships will humbly advise His Majesty that the appeals be allowed, and that in the first suit the decrees appealed from be varied, and that a decree pass in favour of the appellant for the sum of Rs. 5,682 brought out in the judgment of October 15, 1914, with interest thereon at the rate of six per cent. per annum from June 30, 1909, until payment; and that further in the second suit the judgment and decree be recalled, and that that suit stand dismissed; the appellant to have his costs in both suits, here and in the Courts below.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Cameron, Kemm & Co.*

(1) (1806) 12 Ves. 25.

(2) 1909 S. C. 1438.

(3) (1857) 19 D. 598.

(4) (1852) 3 H. L. C. 565, 590.

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PARAMANANDRA DAS GOSWAMI (SINCE)
 DECEASED) AND OTHERS } APPELLANTS;
 AND
 KRIPASINDHU ROY AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land Tenure—Sarbarakars in Khurdah—Absence of heritable or transferable Rights—Liability to Dismissal for Misconduct.

Sarbarakars in Khurdah have no heritable or transferable right in their office or in the sarbarakari jagir lands. They are liable to dismissal for misconduct, and upon dismissal lose all rights in the jagir lands.

Saddanando Maiti v. Nowrattam Maiti (1871) 8 Beng. L. R. 280, discussed.

APPEAL from a judgment and decrees of the High Court (June 4, 1913) modifying a decree of the Subordinate Judge of Cuttack.

The suit was instituted by the appellants claiming, inter alia, to eject the first respondent from certain lands in Khurdah. They alleged by their plaint that the first respondent held the lands in question as sarbarakar in the service of themselves and their co-sharers, mathdharis to whose predecessors in 1861 the lands had been granted by the Government revenue free; that it was his duty to collect the rents due from occupiers of lands from them and that he was liable to be dismissed for misconduct; that he had assumed to be proprietor of the lands, collecting rents and misappropriating them; and that he had been properly dismissed. The first respondent by his written statement denied the facts alleged and claimed to be a tenure-holder of the lands in question.

The Subordinate Judge held that the first respondent was not a tenure-holder, but was a sarbarakar liable to be dismissed for misconduct, and that he had been properly dismissed. He declared the proprietary title of the appellants and decreed that they and their co-sharers should have khas possession of the lands in suit, with the exception of 30 acres which he found to be raiyati land,

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unless the first respondent should within two months execute in their favour a kabuliyat as sarbarakar upon certain specified terms.

The High Court, upon appeals by both parties, held that the first respondent was a tenure-holder, and, save in so far as the proprietary title of the present appellants had been declared, reversed the decree of the Subordinate Judge.

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1918. June 20, 21. *De Gruyther K. C.* and *Parikh* for the appellants. The first respondent had no heritable or transferable right in the lands; he was not a tenure-holder. [Reference was made to "Selections from Correspondence on the Settlement of the Khurdah Estate in the District of Puri," vol. 1, pp. 12, 58, 105, 119, 139, 149, vol. 2, pp. 20, 25 (et seq.), 43 (et seq.), 187, 233, 258; Bengal Tenancy Act (VIII. of 1885), ss. 101, 102, 103-B, 106; Act X. of 1859, ss. 25, 78.]

Sen for the respondents. The first respondent as sarbarakar was a tenure-holder and had permanent rights. [Reference was made to Hunter's "Orissa," vol. 2, pp. 63 (et seq.), 222 (et seq.), 261, 265; Toynbee's "History of Orissa," appx. pp. 100, 169 (minute by Stirling), p. 24; Baden Powell, "Land Revenue in British India," p. 173; "Selections" (as above), vol. 1, p. 119; Mills' Report on Settlement of Cuttack; Ricketts' Report on Settlement of Midnapur; Bengal Regulation VII. of 1822, s. 4; Bengal Regulation XII, of 1805; Act X of 1859, s. 78; Orissa Tenancy Act (II of 1913), s. 15, sub-s. 1; *Saddanando Maiti v. Nowrattam Maiti*, (1)]

De Gruyther K.C. in reply. The case cited referred to a sarbarakar in Cuttack and is distinguishable

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SIR JOHN EDGE. (2). [The judgment, after stating fully the pleadings and the effect of the decrees made in India, continued as follows:]

The learned judges on the appeals considered historically the

(1) 8 Beng. L. R. 280.

(2) The object of this report is to record their Lordships' judgment as to the position of sar-

barakars in Khurdah; the details of the dispute are therefore omitted from the judgment.

J. C. position of sarbarakars in Khurdah from the insurrection in 1817
 1918 of Jagabandhu Mahapatra, the hereditary Bukshi or commander
 of the forces, to the Raja of Khurdah down to the present time, and
 PARAMAN- relied mainly for the information on which they acted on the
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 KRIPA- vol. 2, published in 1881.
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The mauzas which were in 1861 granted revenue free to the Mathdharis were in and prior to 1818 and thence until 1861 khas mahals in proprietary possession of the Government, by whom the sarbarakars were appointed. It is not necessary for their Lordships to refer to all the reports and papers contained in the "Selections," to which their attention has been drawn at the hearing of this appeal. They will refer to those of them only which they consider to be the most important.

Mr. Forrester, who was the Deputy Collector in special charge of Khurdah, in his report of October 17, 1819, on the then settlement, stated that he had in general admitted as sarbarakars the persons who had entered into engagements at the preceding settlements, and had reverted to the rates fixed for the different classes of land in the different villages by Gholam Kadir in 1806, that the sarbarakars were bound by their engagements to adhere to those rates, and not to charge more than 4 annas per man on new cultivation, and they had no proprietary right in their villages ("Selections," vol. 1, p. 105). Mr. Forrester also in his report referred to the general resumption of jagir lands after the rebellion of Raja Mukunda Deo and his followers. The Governor-General in Council confirmed Mr. Forrester's settlement, which was for a term of years.

Mr. Wilkinson, who had succeeded Mr. Forrester in charge of Khurdah, in a report of October 24, 1836, on a settlement which he had made, stated that he had "taken from the old sarbarakars engagements for the payment of the aggregate of the raiyati rents, less 20 per cent. in lands and money, and that in this 20 per cent. he had included the assessed or estimated rents of the jagirs reserved for delabeharas and dalais by Government order." He added that the delabeharas were removable for misconduct and claimed no proprietary rights ("Selections," vol. 1, p. 123.)

On August 22, 1837, the Government confirmed that settlement of Mr. Wilkinson, and stated its agreement with Mr. Halliday, then member of the Board of Revenue, "that neither the engagements (of the sarbarakars) with Government nor, of course, the lands by which the service rendered is remunerated, should be matters of inheritance and liable to sub-division among heirs" ("Selections," vol. 1, p. 136).

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The orders of the Government were on September 15, 1837, forwarded by the Board of Revenue to the Commissioner with the following instructions: "You will cause it to be distinctly notified to the sarbarakars that at the expiration of the present settlement Government will select its own engager, wherever they may choose to exercise the right so to do, and that the present incumbents will be held liable to dismissal for default or bad behaviour satisfactorily proved before the local authorities. It is very desirable that in all future cases individuals only should be acknowledged and allowed to treat as sarbarakars" ("Selections," vol. 1, p. 133).

In his report to the Board of Revenue of October 5, 1880, Mr. Metcalfe, then Commissioner of Orissa, stated in relation to Khurdah: "The Government revenue of Khurdah has hitherto been collected by (1.) sarbarakars proper, (2.) by proostics, and (3.) by reportdars. The first enjoy jagir lands, and enjoy rents of lands brought under cultivation during the period the settlement runs. The second are sarbarakars of homestead lands, who, as a rule, do not enjoy jagir lands. . . . No one of the three classes has any proprietary or hereditary rights" ("Selections," vol. 2, p. 258).

The reports and papers in the "Selections" from the correspondence relating to the settlements in Khurdah have satisfied their Lordships that sarbarakars in Khurdah had under the Government no heritable or transferable right in their office of sarbarakar or in the sarbarakari jagirs; that they were liable to be dismissed for misconduct, and that on dismissal they lost all right to occupy any sarbarakari jagirs; and that on the termination of a settlement they were bound to enter into a fresh engagement with the Government if they wished to be continued in the office of sarbarakar. When the Government in 1861 granted the mauza revenue free to the Mathdharis a settlement had in 1857 been made, and the sarbarakars, including the first defendant's father, Brindaban, had

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entered into engagements by kabuliyats with the Government for the period of the settlement, and the grant to the Mathdharis was subject to those engagements of the sarbarakars. That settlement terminated in 1880. Brindaban died in 1889. The statements in the suits in which Brindaban was concerned, which are referred to in the judgment of the High Court, do not alter the conclusions as to the position of sarbarakars in Khurdah which are to be drawn from the reports and papers in the "Selections."

The High Court came to the conclusion that it was clear that from 1818 onwards the tendency of the Government and of the majority of its officers was to regard the sarbarakars in Khurdah as mere office-holders, and that in practice their position was hereditary. The High Court held that the first defendant was a tenure-holder, and by its decree in the appeal in which the plaintiffs were the appellants dismissed their appeal. In the appeal in which the first defendant was the appellant the High Court by its decree affirmed the decree of the Subordinate Judge in so far as it declared the plaintiffs' title as proprietors of the two and half mauzas in suit ; declared that the first defendant was a tenure-holder ; and in other respects set aside the decree of the Subordinate Judge and dismissed the suit.

On the hearing of this appeal counsel for the first defendant contended that the decision in 1871 of the High Court at Calcutta in *Saddanando Maiti v. Nowrattam Maiti* (1) was an authority which showed that sarbarakari tenures in Cuttack are permanent, hereditary, and transferable. Apparently that decision was not brought to the attention of the Subordinate Judge or of the High Court in this case, possibly because it does not appear that the lands the rent of which was in that case sought to be enhanced were situate in Khurdah ; possibly because it does not appear on what finding of the Court of first appeal or on what evidence, if there was any, as to the position of sarbarakars in Cuttack the High Court came to the conclusion that sarbarakari tenures in Cuttack were permanent, hereditary, and transferable. That case before the High Court was a second appeal.

Their Lordships agree with the Subordinate Judge that the first defendant was not a tenure-holder ; that he was liable to be dismissed

(1) 8 Beng. L. R. 280.

for misconduct from his office of sarbarakar ; that he was rightly dismissed from that office, and that on his dismissal he ceased to be entitled to hold the sarbarakari lands in mauza Bande ; and that, except as to the sarbarakari lands in mauza Panasabasta, the plaintiffs were entitled to the decree in ejectment and for possession, and to the declaration of title which the Subordinate Judge by his decree gave to them.

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The plaintiffs have failed to prove any title in them to the jagir lands in mauza Panasabasta.

Their Lordships will humbly advise His Majesty that this appeal should be allowed. [The details of the Order advised were then stated.] The first defendant must pay the costs of this appeal.

Solicitor for appellants : *E. Dalgado.*

Solicitors for respondents : *G. & W. Webb.*

RAJA DURGA PRASHAD SINGH (SINCE } APPELLANT ;
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TRIBENI SINGH AND OTHERS RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ghatwali Tenure—Succession—Incidents of Tenure—Rights of Family.

Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the zemindar approves as competent to perform the duties. It is the right of the family, unless there is no male member competent, to have one or more of the members appointed. The member appointed, however, does not hold on behalf of the family, and the other members have no rights in the land while it is in his hands as ghatwal.

APPEAL from a judgment and decree of the High Court (July 28, 1914) affirming a decree of the Subordinate Judge of Bhagalpur.

The suit was instituted by the deceased appellant, who claimed possession of a share of 7 annas and a fraction in four villages

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formerly held under ghatwali tenure. The plaintiff claimed as purchaser from certain members of the family of the ghatwals. There were two sets of defendants, namely mortgagees who had purchased under decrees against the ghatwal, and the vendors to the plaintiff.

The facts material to this report appear from the judgment of their Lordships.

The suit was dismissed by the Subordinate Judge and his decision was affirmed by the High Court.

1918. June 27, 28 ; July 1. *Upjohn K.C., De Gruyther K.C.,* and *Parikh* for the appellant. Ghatwali tenure being admittedly hereditary, the onus of proving that the succession was not governed by the ordinary rules of succession under Hindu law was upon the respondents, and they failed to discharge that onus. As an incident of ghatwali tenure the villages were originally held by the four ghatwals on behalf of all the members of the family ; the pottah was granted in lieu of the ghatwali tenure and the villages were held thereunder subject to the same rights. [Reference was made to the authorities mentioned in the judgment.] (1)

Dube for the respondents was called on only as to the effect of the ekrarnama.

July 26. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The suit to which this appeal relates is brought to recover certain lands formerly held under ghatwali tenure, in the zamindary of Kharakpur in Bengal.

These lands were originally held by the zamindar under the ruling power upon terms that the zamindar should perform by himself or his tenants the duty of guarding the ghats or passes against marauders, and preserve the peace of the district and discharge other police services. In the year 1838 the Government, being of opinion that these duties could be, and indeed were being, better

(1) It was also argued on the facts that the appellant's vendors had had actual possession under the pottah; further, that they were entitled to a share under an ekrarnama executed by Dharmu

Roy on September 22, 1873. Upon those points neither the arguments nor the judgment contained matter of which a report would be useful.

performed by their own officers, and that the Government was entitled to resume these lands, as the services for the performance of which they were originally held were no longer needed, claimed to resume them accordingly. Litigation ensued, and the Government was successful in the Courts in India, but the decision was reversed on appeal to the Privy Council, and the Raja zamindar was quieted in his possession. The case was decided in 1855, and is reported as *Raja Lelanund Singh Bahadoor v. Government of Bengal*. (1)

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As it was still possible that the Government might insist upon the zamindar performing certain of the original duties, a compromise was entered into, and a settlement was arrived at by which the zamindar paid a jama of Rs. 10,000 per annum, and was released from further performance of these duties. Thereupon he in turn endeavoured to resume their tenures from the several ghatwals on the ground that their services were no longer required. This led to much litigation with varied fortune. In two cases reported together, the first being *Rajah Lelanund Singh Bahadoor v. Thakoor Munoorunjun Singh* (2), the ghatwals were successful both in India and before the Privy Council. In a third case heard at the same time the ghatwal got better success before the Privy Council than he had in India. These cases were decided in 1873. Further, it appears from the judgment of the Subordinate Judge that there were some other cases, apparently not reported, in which the judgments in India were in favour of the zamindar, but the decisions in the Privy Council in favour of the ghatwals.

In the case of the particular lands now in dispute, they were held by four ghatwals, and the decision went against them and in favour of the zamindar in the High Court at Calcutta, and they appear to have neglected to appeal in time; but on learning that other ghatwals in a similar position had been successful before the Privy Council, they became much dissatisfied, and were endeavouring to see if they could not by some means reopen the question, when a compromise was arrived at, and the zamindar gave a pottah to the four ghatwals granting the lands in perpetuity at an annual uniform jama of Rs. 1031. That pottah was dated July 6, 1873. The grantees Dharmu Roy, Chaman Roy, Gokul Roy, and Mangal

(1) (1855) 6 Moo. I. A. 101.

(2) (1873) L. R. Sup. Vol. I. A. 181.

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Roy are described in it as former ghatwals of the mauzas named in the pottah, and it is recited that "the said mauzas, original with dependency, had from the time of the former rajas been in the possession and occupation of you and your ancestors by virtue of ghatwali right." The litigation and the agreement of the parties to come to an amicable settlement are then recited, and the raja proceeds to make the grant in the following words: "Therefore I have made in favour of you the permanent istamrari mokurari settlement in perpetuity, descendible to progeny and generation after generation in respect of mauza Khadawa, &c., original with dependencies in existence from before at an annual uniform jama of Rs. 1031."

The four grantees thereafter dealt with the property as their own, as property held by each severally, in respect of his 4-anna share as a member of a Hindu family, holding jointly with his sons and grandsons.

The four grantees, as managers or kartas of a Hindu family, jointly made mortgages and leases, and, in particular, in the year 1884 they, with their sons and other descendants, executed two mortgages in favour of Shitabi Singh. Upon these mortgages decrees were ultimately obtained, and the villages were sold in execution to the first party defendants, whose representatives are the respondents appearing before the Board to support the judgments under appeal. Delivery of possession was made on March 6, 1897. It should be added that since the date of delivery the first party defendants or their predecessors have been in possession.

The case made for the plaintiff appellant accepts a large part of that of the defendants respondents. The pottah is admitted, as also are the apparent title thereby created in favour of the four grantees, Dharmu, Chaman, Gokul, and Mangal, the title deduced from them to the first party defendants and the possession by the latter from the date of delivery upon the sale. The case made is that the pottah was granted to the four grantees as representatives of one great family descended from a common ancestor, and that all the male descendants have beneficiary interests in the several mauzas according to their respective shares per stirpes, and that the plaintiff is the assignee of interests of several of these

descendants in respect of shares amounting to 7 annas and a fraction, or nearly half. (1)

On the assumption made on behalf of the plaintiff Rupdeo, a brother of Chaman and his descendants have a claim to some beneficiary share, presumably a 1-anna share; Chintaman, brother of Dharmu and uncle of Chaman and his descendants, would have a 2-anna share; in the other line, Ajit and his descendants would have a 4-anna share, and Chauthi and his descendants a 2-anna share. The plaintiff has bought up all these shares, except those of some of the descendants of Chauthi.

Lachman Roy, the common ancestor, flourished about 1750. He was probably in his day the ghatwal. His son Bahore was ghatwal; so was Bahore's son Ajit. Sukdeo, the grandson by the other line, was ghatwal apparently with Bahore, and later on with the latter's grandson Anandi. In 1854 Digan, father of Mangal, was ghatwal in conjunction with some member of the other line, probably Dharmu; and then in 1864, when the zamindar sought to eject them, the four grantees were the ghatwals.

The plaintiff suggests that they were chosen as the representatives of the several branch families, and held their shares of the family estate on behalf of all the male members. This case is rested upon three grounds; the nature of the ghatwali tenure as determined by the several decisions of the Privy Council, the alleged enjoyment by the beneficiaries of their respective shares from the grant of the pottah to the sale by the Court, and upon an ekrarnama executed on September 22, 1873, that is between two and three months after the pottah.

As regards the first ground there are several decisions of the High Court and of this Board on the nature of this tenure. Some have already been cited, and in addition special reference may be made to *Rajah Nilmoni Singh v. Bakranath Singh* (2), decided in 1882, a case not so much in point, as the ghatwali lands were in another zamindary, and to *Tekait Kali Pershad Singh v. Anund Roy* (3), decided in 1887, concerning other lands in the zamindary of Kharakpur.

(1) A pedigree was here given
but does not appear to be necessary

for the purpose of this report.

(2) (1882) L. R. 9 I. A. 104.

(3) (1887) L. R. 15 I. A. 18.

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The result of the decisions is that the ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the zamindar approves as competent, and that it is the right of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed ghatwals. It was certainly an advantage to the whole family that one of their members should hold the office and the tenure. He could put other members of the family into minor offices and grant them subordinate interests commonly called jotes, and he could and would generally provide for the family in the manner expected of its head. But this is a long way off making him a trustee for the family or treating the ghatwali estate as possessed by the family and reducing the ghatwal to the position of karta or managing head of the family. Their Lordships do not find that the incidents of ghatwali tenure are such as to give the family any rights over the property while it is in the hands of the ghatwal, and they find themselves upon this point in full agreement with the Courts in India. So far, therefore, if the assumption were to be made that the scheme of the pottah was to preserve family rights, there would still be no reason for holding that they extended so as to give any beneficiary interest in the mauzas to the male members of the family other than the actual grantees.

[Their Lordships rejected the appellant's further contentions. They found that neither the vendors nor their predecessors had been in possession of the shares claimed, thus agreeing with the finding of the Subordinate Judge, from which the High Court had not differed. They also held that the claim to a share based upon the ekrarnama of September 22, 1873, was barred by the Limitation Act. The judgment concluded :]

Upon the whole, therefore, the plaintiff has failed to prove title to any portion of the property in suit, and the decrees of the Subordinate Judge and the High Court dismissing his suit were right, and their Lordships will humbly recommend His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents : *Watkins & Hunter.*

KAIKHUSHRU BEZONJI CAPADIA . . . APPELLANT;
 AND
 SHRINIBAI BEZONJI CAPADIA AND OTHERS. RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Will—Construction—Life Interests—Reversionary Trust—“If then living”—Vested Estate.

A Parsi by his will devised a house to his wife for her life and directed that after her decease his executors should hold the house in trust for his son J. for life, and in the event of J.'s death in trust for J.'s widow (as to part if he so appointed) and for J.'s issue, and in default of such issue and subject to such appointment, in trust for the testator's son K. "if then living." J. died unmarried in the lifetime of the testator's widow, and of K.:—

Held, that upon the death of J. the house vested absolutely in K. subject to the life interest of the testator's widow.

APPEAL from a judgment and decree of the High Court (July 31, 1916) affirming a decree of Macleod J.

The suit was instituted in the High Court by the appellant and related to the will of the appellant's father, Bezonji Nanabhoy Capadia, a deceased Parsi inhabitant of Bombay.

The question for determination was whether upon the true construction of the will the appellant had an absolute interest in a house called Capadia House, and property which devolved with it, or merely an interest contingent upon his surviving his mother.

The material clauses of the will and the effect of the judgments in the High Court at Bombay appear from the judgment of their Lordships.

1918. July 4. *P. O. Lawrence K.C.* and *Kenworthy Brown* for the appellant. Upon the true construction of the will the words "if then living" in clause 20 mean "if living at the death of Jehangir." It is a well-established rule of construction that the words "if then living" following successive life interests refer to the death of the person last named as having a life interest: *Jarman*

* *Present*: LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, SIR JOHN EDGE, and MR. AMEER ALI.

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on Wills, 6th ed. p. 1675. The rule as stated by Jarman is based upon *Archer v. Jegon* (1) and other authorities and was expressly approved by Lindley L.J. in *In re Milne*. (2) The decision in *Archer v. Jegon* (1) covers the present case. Upon the death of Jehangir, therefore, Capadia House, and the property which was to devolve with it, vested in the appellant subject only to the life interest of the testator's widow. This being a question of a present vested right the trial judge was wrong in declining to pronounce upon it : *Curtis v. Sheffield*. (3)

E. B. Raikes for the respondents 9 and 10 (daughters of the testator). Upon the true construction of the will there was no estate in Capadia House which could be transmitted until the death of the testator's widow : Indian Succession Act (X. of 1865), ss. 105, 107, illustration (c). Everything which follows clause 19 is governed by the words "I further direct that after the decease of my said wife." *Archer v. Jegon* (1) is distinguishable, since there was a direct gift to the widow and the trust was expressed to operate only after her death. Further, that decision applies only when the gift in question is expressed to be "after the death of" a beneficiary, not when words of contingency, such as "the event of," are used. The draftsman used both expressions in the will and intended that they should be given different effects. A slight indication is sufficient to prevent the rule from applying : *In re Dundalk and Enniskillen Ry.* (4) [Reference was also made to *Hoghton v. Whitgreave* (5), *Wordsworth v. Wood* (6), *Harvey v. Harvey* (7), *Gill v. Barrett* (8), and *Penny v. Commissioner for Railways*. (9)]

July 26. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The suit to which this appeal relates was brought in order to settle certain questions of construction arising on the will of a wealthy Parsi inhabitant of Bombay, Bezonji Nanabhoy Capadia, who died on April 3, 1906, leaving his wife, two sons, and several daughters surviving him. The will is dated

(1) (1837) 8 Sim. 446.

(2) (1887) 57 L. T. 828.

(3) (1882) 21 Ch. D. 1, 3.

(4) [1898] 1 I. R. 219.

(5) (1819) 1 Jac. & W. 146.

(6) (1839) 4 My. & Cr. 641.

(7) (1839) 3 Jur. 949.

(8) (1861) 29 Beav. 372.

(9) [1900] A. C. 628.

April 10, 1905. It is long and elaborately drawn, and contains thirty-three paragraphs.

The testator appoints executors and trustees. He makes certain specific gifts. He directs his executors, "in the event of" the death of his wife, which must mean "on" the death of his wife [see *Penny v. Commissioner for Railways* (1)], to expend a certain sum of money in providing the expenses of her funeral and the customary rites and ceremonies. He makes certain provisions for a daughter on the occasion of her marriage, and he leaves annuities to be paid to the wife, the daughters, and certain other relatives during the wife's life, and he directs that the residuary income should be divided and paid during his wife's life to his two sons, with certain provisions in the event of either son's death for the latter's widow and issue. Then come gifts which are of special importance to the present purpose. He devises to his wife during the term of her natural life the house in which he was living called Capadia House, and he directs his executors during the lifetime of his wife to let another house of his called Rutton Villa, the rent of Rutton Villa being to count as part of the residuary income.

Clauses 19, 20, 21, and 25 are those the construction of which is to be determined in this suit.

"19. I further direct that after the decease of my said wife Shereenbai or in case she shall predecease me then forthwith after my death my executors shall stand seised and possessed of the Capadia House and the furniture therein and Rutton Villa and all my residuary property upon the several trusts in that behalf hereinafter declared that is to say:—

20. My trustees shall stand seised of the Capadia House upon trust for my said son Jehangir for life and in the event of his death upon trust for his widow and issue in such shares and proportions as the said Jehangir may by his will direct provided that it shall not be lawful for the said Jehangir to appoint more than one-fourth part of the said premises to his widow and subject thereto and in default of any such appointment upon trust for the issue of the said Jehangir such issue to take per stirpes and not per capita and if more than one in the same class equally between them and in default of any such issue and subject to any appointment for his widow as

(1) [1900] A.C. 628, 634.

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aforesaid upon trust for his brother the said Kaikhushru if then living and failing him upon trust for the right heirs of me the said Bezonji Nanabhoy Capadia as if I the said Bezonji Nanabhoy Capadia had died possessed thereof intestate in equal shares and proportions but the issue of any heir shall take per stirpes and not per capita and if more than one in the same class equally between them and excluding from such heirs and such division the widowers of my said daughters and the widows of my said sons."

Clause 21 has similar limitations with regard to Rutton Villa, the two brothers being put in inverse order.

" 25. My trustees shall divide the rest residue and remainder of my property equally between my said sons Jehangir and Kaikhushru but the property or the proceeds thereof shall be held by my executors for the benefit of the said Jehangir and Kaikhushru respectively upon the trusts which are hereinbefore declared of and concerning Capadia House and Rutton Villa respectively as fully and effectually as if the share of the said residue given to my son Jehangir were part and parcel of Capadia House and the share of the said residue given to my son Kaikhushru were part and parcel of Rutton Villa."

The son Jehangir is now dead without leaving widow or issue ; but the widow of the testator is still living. The other son, Kaikhushru, now claims that he has fulfilled the condition imposed in clause 20, inasmuch as at the death of his brother he was " then living " ; but those interested in the subsequent limitation as the right heirs of the testator in the language of clause 21 contend that Kaikhushru will not fulfil the condition in clause 21 unless he survives his mother as well as his brother.

In these circumstances Kaikhushru, who is the present appellant, brought a suit on January 11, 1916, to have the construction of the will determined in respect of this and some other matters not now to be considered, making the trustees and executors, his mother, his sister, and certain other parties defendants, and having filed his plaint took out a summons for the determination of certain questions, inter alia : " 1. Whether in the events that have happened the plaintiff is not absolutely entitled to the property known as Capadia House subject to the life interest of the first defendant therein and who is now entitled and for what interests therein to

the said House. 2. Whether in the events that have happened the plaintiff is not entitled to the balance of the rents of Rutton Villa and the income of the residuary estate of the said testator subject to the annuities directed to be paid by clauses 16, 17, and 18 of the said will during the lifetime of the first defendant. 3. Whether the plaintiff has not a vested interest in one half of the residuary estate of the said testator and is not entitled to possession thereof on the death of the first defendant and whether the other half of the residuary estate is not subject to the same trusts as are created in respect of Rutton Villa. 4. What are the rights and interests of the plaintiff in Rutton Villa and in the residuary estate of the said testator during the lifetime of the first defendant and on her death."

Macleod J., being of opinion "that the proper time to construe the will with regard to the trusts which are to come into operation on the death" of the widow would arrive when the widow dies, declined to answer any of the questions propounded, but gave to the plaintiff and to the defendants Nos. 2 to 8 and 9 and 10 (there is apparently an error in the print of the record describing these last as 10 and 11) their several costs out of the estate as between attorney and client.

It appears to their Lordships that it was an error on the part of Macleod J. to consider the questions as premature and to refuse to answer them. If the construction for which the plaintiff contended was correct, he would have a vested remainder with which he could deal, and he was therefore entitled to the decision of the Court.

From the order of Macleod J. an appeal was taken to the Appellate Division of the High Court at Bombay, and this Court entered upon the question of construction; but, taking a view unfavourable to the plaintiff, and holding that he had no vested interest, concurred in the decision of Macleod J. and dismissed the appeal, giving to the defendants 2 to 8 their costs out of the estate as between attorney and client, and ordering the plaintiff to pay the costs of defendants Nos. 9 and 10 as between party and party. It is from this judgment that the present appeal is brought.

The Chief Justice and Heaton J., who formed the Court, were of opinion that this case did not fall within the rule "that where

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there is a gift after prior interests to persons then living the word 'then' refers most naturally to the last antecedent"; but within another class of cases, such as *Harvey v. Harvey* (1) and *Gill v. Barrett* (2), in which it was held that, if the object of the testator is not to limit successive interests but to provide for personal enjoyment by the legatees by substituting for persons dying before the period of enjoyment a class of persons then living, the word "then" refers most naturally to the period of enjoyment.

If the fact that the prior gift to the wife for her life is direct and the subsequent gifts indirect through the medium of trustees be laid aside, the will falls directly within the rule of *Archer v. Jegon*. (3) In that case the testator gave a sum of stock interest for his sister for life, after her decease for her husband for life, and after his decease for the children of his sister "who should then be living." There were five children. The husband died first, then one of the children, then the wife; and it was held that the deceased child took a vested interest in one-fifth of the fund, because the word "then" necessarily referred to the last antecedent, the husband's decease, and the child was living at that time.

In *In re Milne* (4) the Court of Appeal followed and approved of *Archer v. Jegon* (3), holding that the word "then" in the will under discussion referred to the last antecedent. This was a very strong decision, because this construction created an intestacy. In the course of his judgment Lindley L. J. referred to the statement of the rule in *Jarman on Wills*, where the result of the cases, *Archer v. Jegon* (3) and others, is collected and summed up with approval. Counsel for the respondents relied upon the two cases quoted by the High Court, and also upon *Hoghton v. Whitgreave* (5) and *Wordsworth v. Wood*. (6) Neither of these latter cases has any bearing upon the present one. In *Hoghton v. Whitgreave* (5) the point to be decided was who took under a bequest to survivors upon the death of the one tenant for life. In *Wordsworth v. Wood* (6) there might have been a question as to whether survivorship related to the death of the testator or to the death of the tenant for life. But the Lord Chancellor held that it was not a case of sub-

(1) 3 Jur. 949.

(2) 29 Beav. 372.

(3) 8 Sim. 446.

(4) 57 L. T. 828.

(5) 1 Jac. & W. 146.

(6) 4 My. & Cr. 641.

stitution of a child's issue for the child, but of modification of the gift to the child, and that the child had to survive the tenant for life in order to take.

In *Harvey v. Harvey* (1) there was a bequest of a life interest to a daughter, and the capital was then to go to the daughter's son; but in case he should die in the lifetime of his mother the money was to be divided among his children then living, who were to take vested interests on attaining twenty-one or, in the case of a female, marriage. It was held that the period when the class was to be ascertained was the death of the daughter. This was apparently on the ground that the division could not take place till her death. No cases appear to have been cited, and the decision turned upon the particular language of the will. In *Gill v. Barrett* (2), *Harvey v. Harvey* (1) and *Archer v. Jegon* (3) were cited, and the Master of the Rolls expressly gave his assent to *Archer v. Jegon* (3) and to the rule that "then" refers to the last antecedent. But in this case he held, as had been held in *Harvey v. Harvey* (1), that the time of division was the time to be looked to, and that the word "then" referred to that time. Neither of these cases is like the present one.

Counsel for the respondents submitted that, even supposing that the rule in *Archer v. Jegon* (3) would otherwise have applied, the particular language of this will would take the dispositions out of the rule, because the gift to the wife of Capadia House for her life was direct, whereas the subsequent limitations were to trustees for the benefit of the subsequent beneficiaries.

In their Lordships' opinion this argument rather tends in the contrary direction. The limitations which begin with clause 19 are all after the death of the wife, and the interests which they give are necessarily in remainder after her death. If they or any of them were to be conditional on survivorship of her and not in remainder to her, this ought to have been expressed at the outset of the clause, and it would be awkward, to say the least, to express it in the middle of the limitations. The limitations to the beneficiaries in clauses 20 and following may be treated as being all bracketed under the trust, being limitations ensuing upon the death

(1) 3 Jur. 949.

(2) 29 Beav. 372.

(3) 8 Sim. 446.

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of the tenant for life. They may be conditional inter se. They are, however, not so expressed as to be conditional upon survivorship, but as subsequent to the life estate. If it had been intended to make the plaintiff's estate in remainder conditional upon surviving his mother instead of its being conditional upon surviving his brother, the words would have had to occur in a different collocation. If it had been intended to make it conditional upon survivorship of both, additional words would have been necessary.

Upon the whole, their Lordships are of opinion that the point is settled by authority, and that the construction of clause 20 for which the plaintiff contends is the right one; and the same construction must be applied to clause 25, which directs that half of the residue should be held upon "the trusts declared of and concerning Capadia House."

A question was asked upon Rutton Villa and the other half of the residue; but it is not apparent why it was asked, as there is no difficulty or uncertainty upon these points in the will. It will be sufficient to make a general declaration which will give the answer to the material questions.

In the Court of first instance costs were given to the plaintiff and to defendants Nos. 2 to 8 and 9 and 10, as between attorney and client, out of the estate, and this was correct. In the Court of Appeal costs were given to defendants 2 to 8, as between attorney and client, out of the estate; this also was correct. The plaintiff was, however, ordered to pay the costs of the ninth and tenth defendants. This order can no longer stand. Their Lordships think that, this being a case of construction, and apparently one of some difficulty, and having given rise to difference of judicial opinion, it would be proper that the party and party costs of the plaintiff and the ninth and tenth defendants, who are the respondents on this appeal, should come out of the estate.

Their Lordships will therefore humbly recommend His Majesty that the judgment of the High Court should be reversed, except in so far as it confirmed that part of the judgment of Macleod J. which dealt with the costs of the suit, and except in so far as it awarded to the defendants 2 to 8 their costs out of the estate, as between attorney and client, and that it be declared that, in the events which have happened, the plaintiff is absolutely entitled to the

property known as Capadia House and to the one-half of the testator's residue bequeathed upon the trusts declared of and concerning Capadia House, subject to the life interest of the first defendant, and that it be ordered that the plaintiff appellant and the ninth and tenth defendants and respondents should have their costs, as between party and party, in the High Court and of this appeal out of the testator's estate.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Lattey & Hart.*

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Adoption—Dravada Country—Widow's Power—Absence of Husband's Authority—Assent of Sapindas.

According to the Mitakshara law as applied in the Madras Presidency, a Hindu widow may, without her husband's authority, adopt a son to him with the assent of his sapindas; if the assent of the nearest sapinda is not given, the assent of remoter sapindas is not sufficient to make an adoption valid.

APPEAL from a judgment and decree of the High Court (April 17, 1914) affirming a decree of the District Judge of Ganjam.

The first appellant instituted a suit against the respondents claiming that by adoption he was the reversionary heir to one Vishwanadha Rao who died in 1880. By his plaint he alleged that he was adopted in 1896 by Narasayamma to her deceased husband Pedda Sanyasiraju, with the assent of the latter's sapindas; and that the assent of the respondents' father, who was the nearest sapinda living at the date of the adoption, had been withheld improperly and merely in order to secure the property for himself and his sons.

The facts appear from the judgment of their Lordships.

* *Present:* LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE, and MR. AMEER ALI.

J. C. Both Courts in India held that there had not been such an assent
1918 by the sapindas as rendered the adoption, which was without the
authority of the deceased, valid.

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1918. May 10. *De Gruyther K.C.* and *Parikh* for the appellants.
The assent shown by the evidence to have been given by the
sapindas was sufficient to make the adoption valid. The question is
one of mixed law and fact : the concurrent findings therefore are
not conclusive. It is not necessary that all the sapindas should
assent. The true test is whether the sapindas as a body assented,
acting upon what they believed to be the wish of the deceased, and
for his spiritual welfare. The motive of the widow is not material.
The authorities show that an assent given for improper and corrupt
motives is not effectual. It is submitted that equally the with-
holding of assent by the nearest sapinda for reasons of self-interest
should be disregarded. The nearest sapinda's consent to an adop-
tion having been refused upon a previous application, the widow
was not bound again to apply for it. [Reference was made to
Collector of Madura v. Mootoo Ramalinga Sathupathy (known as the
Ramnad Case) (1), *Vellanki v. Venkata Rama* (2), *Venkatakrish-
namma v. Annapurnamma* (3), and *Parasara Bhattar v. Rangaraja
Bhattar*. (4)]

Dunne K.C. and *Dube* for the respondents were not called upon.

1918. July 11. The judgment of their Lordships was delivered by

MR. AMEER ALI. This appeal arises out of a suit brought by the
plaintiff, Basavaraju, on December 22, 1909, in the Court of the
District Judge of Ganjam, in the Madras Presidency, for possession
of considerable landed property by virtue of his right as the nearest
reversioner by adoption to one Vishwanadha Rao the last male
owner. The question for determination by this Board is whether
the adoption under which he claims title is valid under the Hindu
law. Vishwanadha died in 1880, and since his death the properties
were held by his widow, Mahalakshamma, for a Hindu widow's
estate until her decease in 1908, when the defendants, who are

(1) (1868) 12 Moo. I. A. 397,
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(2) (1876) L. R. 4 I. A. 1.

(3) (1899) I. L. R. 23 M. 486.

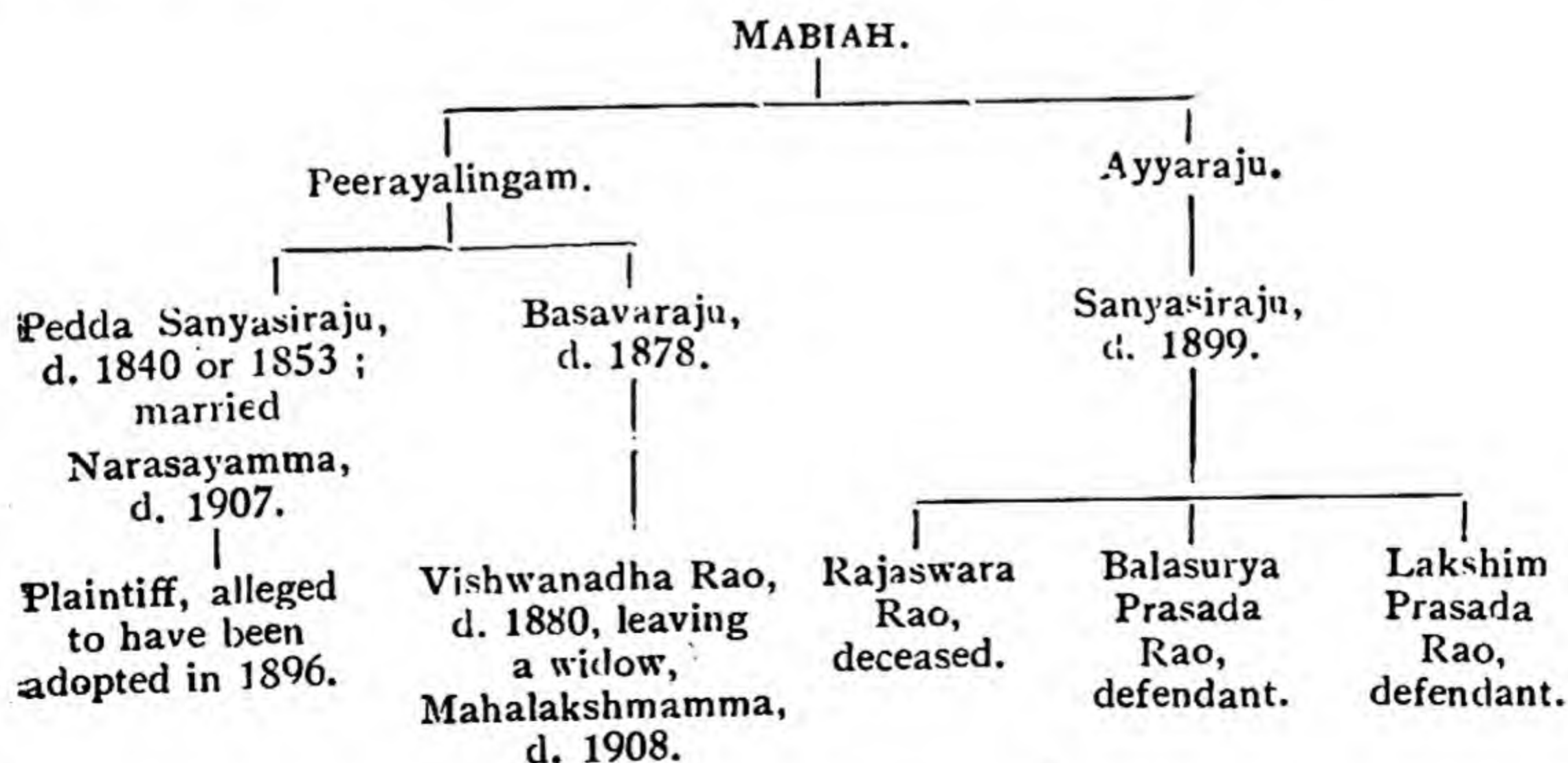
(4) (1880) I. L. R. 2 M. 202.

admittedly the grandsons of Vishwanadha's paternal granduncle, and who, on failure of the adoption alleged by the plaintiff, would be entitled as the nearest reversioners, took possession of the same; their possession was confirmed by the revenue authorities, before whom the question now in dispute was first litigated.

The plaintiffs' claim is based on the allegation that Basavaraju, the father of Vishwanadha, and one Pedda Sanyasiraju were two brothers, and that Pedda predeceased Basavaraju, leaving a widow named Narasayamma, who in 1896 adopted him as a son to her husband. He is thus, he asserts, nearer in degree as the paternal uncle's son to Vishwanadha, and has therefore a title superior to that of the defendants to the succession to his estate.

The *Ramnad Case* (1) established the proposition that, in the Dravada country, under the Dravidian branch of the Mitakshara law there in force, in the absence of authority from her deceased husband a widow may adopt a son with the assent of his male agnates. The plaintiff, accordingly, placed his adoption on two grounds—first, that Narasayamma had direct authority from her husband to adopt a son to him; and, secondly, that his own adoption was made with the authority of the husband's kindred.

After the institution of the suit other parties, who had acquired interests in the properties in dispute from the plaintiff or from his guardian, were joined as co-plaintiffs; it is, however, unnecessary to refer to them in this judgment. The following pedigree will explain the exact relationship of the contesting parties :—



(1) 12 Moo. I. A. 397.

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The defendants challenged both the power of the widow to make any adoption and the validity of the assent or authority with which it was alleged to have been made. They contended that under the circumstances, which will be detailed later, Narasayamma had no power to make an adoption to her deceased husband, and that in any event the assent of the sapindas, on which its validity was conditioned, was not legally sufficient. The District Judge before whom the case came for trial in the first instance, in an able judgment in which he examined the facts as well as the law applicable to those facts with considerable care, came to a conclusion wholly adverse to the plaintiff. He held in substance that the plaintiff had failed to establish the alleged authority from the husband to the adopting widow, and that the consent of the sapindas on which the claim was rested was not sufficient. The learned judge further held that Peerayalingam and his two sons Pedda and Basavaraju formed a joint undivided Hindu family; that Pedda died in the lifetime of his father somewhere before 1842; that on his death his interest in the joint family property vested by right of survivorship in Peerayalingam and Basavaraju; and that he left no separate property to which his widow could succeed and hold separately. He held that in this condition of the joint family the power and capacity of his widow to make any adoption to him came to an end when the joint family property vested in Vishwanadha's widow. He accordingly dismissed the plaintiffs' suit. The High Court of Madras on the plaintiffs' appeal did not consider it necessary to enter upon a consideration of this latter branch of the learned judge's decision relating to Narasayamma's power to make the adoption. They, however, concurred with the first Court in its other findings, and in agreement with the trial judge held that the sapindas' assent was not sufficient in law to validate the adoption in question, and dismissed the appeal.

The plaintiff has now appealed to His Majesty in Council, and it has been strenuously urged on his behalf that the lower Courts have wrongly applied the law to the present case. As the trial judge has in his judgment fully set out the facts, their Lordships are relieved of the necessity of stating them in any detail. They propose, therefore, to refer only to some salient points in the history of this family. It appears that Peerayalingam, the grand-

father of Vishwanadha, died in 1846, leaving him surviving his widow Veyamma, who was the owner in her own right of the greater part of the property which forms the subject-matter of this litigation. The plaintiff alleged that Pedda died in 1853, whilst the defendants place his death so far back as 1840. As already stated, the trial judge has found on the evidence that the latter date represents approximately the real date of his death. The finding is that he died some years before his father's death in 1846. Veyamma died in 1855, when the entire family estate vested in Basavaraju, the surviving son of Peerayalingam. He died in 1878, leaving a son Vishwanadha, who survived him only two years. On his death his widow succeeded to the estate, and held it as a Hindu widow until 1908. Narasayamma, the widow of the predeceased co-parcener, had become, on the death of her husband, entitled to maintenance, which she received from the estate until her death in 1907. Peerayalingam, the grandfather of Vishwanadha, had a brother named Ayyaraju; his son was also called Sanyasiraju and the present defendants are the sons of that Sanyasiraju. At the time of the alleged adoption this Sanyasiraju, who might be conveniently called Sanyasi II., was alive.

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Upon that state of facts the two questions of law which the High Court had to determine were exactly the two which the District Judge has discussed and decided. First (and this went to the very root of the plaintiffs' title), whether Narasayamma had, under the circumstances of Peerayalingam's family, any power in 1896 surviving in her to make the adoption; secondly, if she had, whether the assent that is put forward is sufficient. As already observed, the High Court have abstained from expressing an opinion on the first point.

Assuming that Narasayamma had, when she purported to adopt the plaintiff Basavaraju, the power to make the adoption, the question arises whether that power was validly exercised. In the absence of authority from the husband, the valid exercise of the power by a Hindu widow in the Dravada country is conditioned on the assent of her husband's sapindas. In the present case the claim is rested on the assent of seven kinsmen. The District Judge has, for convenience of reference and examination, divided the agnatic relations of Vishwanadha living at the time of the alleged

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adoption into five groups in the order of propinquity. In the first group are included Sanyasiraju (the defendants' father) and the defendants. Sanyasiraju died in 1899; it has been found that his assent was not asked for nor given. In the second group are included three persons whose consent is said to be contained in a paper exhibited, but both Courts have held their signatures to be forgeries. To group 3 belong plaintiff Basavaraju's father, his paternal uncle, and a witness of the name of Ayyappa Raju. These three have certainly given their assent to the adoption. To group 4 belonged a man named Borayya Bhusana, since deceased, who is alleged to have conveyed his assent in a letter addressed to the widow. This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption. There are several men in the remotest group who do not seem to have been approached and do not enter into the consideration of the case.

The question, then, is whether, in the absence of authority from the husband and of the consent of the nearest sapinda, the assent of remote sapindas is sufficient to validate the exercise of the widow's power? None of the decided cases deal with the concrete question under consideration. The decision in the *Ramnad Case* (1), which forms the principal authority on the validity of an adoption with the consent or authority of the husband's sapindas, declares in general terms the class of kinsmen among whom the consent should be sought; and the generality of the expressions has in some instances given rise to doubts. But a close examination of the judgment shows clearly to their Lordships' minds what the Board intended to indicate. Dealing first with the case of a joint and undivided family, joint in food, worship, and estate, the Board observed as follows: "The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—i.e. undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of

(1) 12 Moo. I. A. 397.

the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will."

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There the widow had acquired some property which was held by her husband separately from the other members of the family, which is not the case in the present instance, as Pedda left no separate property. Dealing with the case of a widow so situated, Sir James Colville went on to say: "Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive."

The decision in the *Ramnad Case* (1) was followed and explained in *Vellanki v. Venkata Rama* (2), which established the following propositions: That the requisite authority in the case of an undivided family is to be sought by the widow within that family;

(1) 12 Moo. I. A. 371.

(2) L. R. 4 I. A. 1.

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that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family; what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by "community of corporal particles." The father of the deceased, if still alive, continues to be her "natural guardian and venerable protector." He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband he has a right to the reversion. His authorization is therefore essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest sapindas; they become her natural guardians and the protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives. In this connection it seems desirable to bear in mind the following observations of the Board in *Raghanadha v. Brojo Kishoro* (1): "But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession,

(1) (1876) L. R. 3 I. A. 154, 193.

as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

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It is true that in the judgment of this Board in the *Ramnad Case* (1) some expressions are used which might imply that the question of reversionary interest forms only a secondary consideration in determining what sapindas' assent is primarily requisite, but the remarks that follow as to the right of co-parceners in an undivided family to consider the expediency of introducing a new co-parcener, coupled with the observations of the Board in the subsequent case (2), show clearly that rights to property cannot be left out of consideration in the determination of the question. In the latter case the Board observe as follows : "There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives, in order to defeat the interest of this or that sapinda, but upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband." (2)

And an eminent Hindu lawyer, dealing with the question whose consent is requisite to the validation of an adoption when the husband is separate, remarks that an adoption is more a temporal than a spiritual institution, there being no spiritual reason for adoption if the deceased left a fraternal nephew, and that the requisites of a valid adoption are all temporal ; therefore, the spiritual consideration should not be allowed to influence the judgment regarding the secular essential. And he then goes on to add : "Some light is thrown on the point by the decisions relating to alienations by widows with the assent of the next heir." (3)

The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas

(1) 12 Moo. I. A. 397.

(2) I. R. 4 I. A. 1, 14.

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(3) Golap Chandra Shastri,
Hindu Law of Adoption, p. 259.

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other than brothers. In the present case Sanyasi II. was unquestionably the nearest sapinda to Pedda at the time of Narasayamma's adoption. He was also unquestionably nearest to Vishwanadha. The case for the plaintiff is that in 1882 he had given his consent to Narasayamma making an adoption, which was repeated in 1894. The trial judge who heard the evidence found as a fact that both allegations were false ; and the High Court agree in that view. The concurrent finding of the two Courts on this point is not open to question on this appeal. Their Lordships consider that, even if the matter were open to discussion, the reasons given by the District Judge for disbelieving the story are conclusive.

It was argued at the Bar that no application was made for the assent of Sanyasi II. because it was known that he would refuse. This, in their Lordships' opinion, is a futile reason for not applying for his assent.

In their Lordships' opinion this suit must fail on the second ground on which the trial judge decided the case, namely, that Narasayamma did not obtain the requisite assent necessary for the valid exercise of that power. Their Lordships express no disapproval of the decision of the District Judge on the first point, but, like the High Court, do not find it necessary to decide it.

Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dismissing the suit should be affirmed and the appeal should be dismissed with costs.

Solicitor for appellants : *Edward Dalgado.*

Solicitor for respondents : *Douglas Grant.*

RAJA DURGA PRASHAD SINGH (SINCE DECEASED)	}	APPELLANT;
AND		
TATA IRON AND STEEL COMPANY, LIMITED	}	RESPONDENTS.

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July 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Landlord and Tenant—Mining Lease—Construction—Right to Surrender—Condition as to Payment of Money due—Time for Payment—Waiver.

The appellant by lease for 999 years granted to the respondents coal mining rights in certain villages. Royalties per ton of coal were to be paid quarterly, and if at the end of each Bengali year the amount so paid had not reached a fixed minimum the difference was to be paid within the two following months; rent for surface rights was to be paid annually. Clause 9 provided that the respondents should be entitled to surrender any of the villages upon giving six months' written notice "and paying the minimum royalty for the said six months," and that the respondents should "not be entitled to surrender so long as any rent or royalty remains unpaid."

On May 11, 1912, the respondents gave six months' notice of their intention to surrender all the villages. The appellant's manager requested that a formal deed of surrender should be executed. On May 22, 1913, the deed not having been yet tendered or the amount due ascertained, the appellant denied that the surrender was effectual on the grounds that the notice did not expire at the end of the Bengali year, and that the amount due had not been tendered; the appellant subsequently sued for royalties upon the basis that the lease was subsisting:—

Held—(1.) that the right to give notice under clause 9 could be exercised at any time; (2.) that that clause did not require that the amount due should be tendered when the notice was given, and that, the appellant's manager having requested that the surrender should be by deed, the payment had not to be made until the deed was tendered; and (3.) that the lease had been terminated and the suit therefore failed.

APPEAL from a judgment and decree of the High Court (February 22, 1916) reversing a decree of the Subordinate Judge of Peerulia.

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, and LORD WRENBURY.

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The appellant sued the respondents to recover royalties under two mining leases; the respondents pleaded that the leases had been determined.

The material terms of the leases and the relevant facts appear from the judgment of their Lordships.

The Subordinate Judge made a decree for the amount claimed; that decree was set aside by the High Court.

1918. June 21, 24. *Upjohn K.C., De Gruyther K. C., and Parikh* for the appellant. Upon the true construction of the leases notice could only be given under clause 9 to expire at the end of a year or half-year. In *Bridges v. Pott* (1), relied on in the High Court, the document was an executory agreement, and its terms materially differed from those of the leases. Further, it was a condition precedent to a surrender under the clause that the sum due should be paid on or before the expiration of the notice: *Grey v. Friar*. (2) The operation of the notice was not merely postponed until payment. The facts do not show a waiver; the appellant's manager had no authority to waive performance of the condition.

[Their Lordships did not require to hear the respondents' counsel as to the time at which a notice under clause 9 could be given.]

P. O. Lawrence K. C., Dunne K. C., and Kenworthy Brown for the respondents. The payment had not to be made when the notice was given; at that date it was impossible to calculate the amount payable. The two months' grace given by clause 3 applies to the payment required by clause 9. But even if payment was a condition precedent to the surrender, the date of payment was postponed by the request for a deed. The conduct of the manager, and of the appellant himself in entering into negotiations through his solicitors, amounted to a waiver. The respondents were led to believe that payment at the date when the notice expired was not insisted on; but for that they would have given a fresh notice. The appellant's manager had implied authority in the matter: Indian Contract Act, 1872, ss. 186, 229, 237.

Upjohn K. C. replied.

(1) (1864) 17 C. B. (N.S.) 314.

(2) (1854) 4 H. L. C. 565.

July 26. The judgment of their Lordships was delivered by

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LORD BUCKMASTER. The appellant is the heir and legal representative of Raja Sri Sri Durga Prashad Singh, the plaintiff in the suit out of which this appeal has arisen. The proceedings were instituted to recover from the respondents the sum of Rs. 26,237, being the alleged arrears of royalties due under two mining leases granted by the Raja to the respondents, and dated respectively March 4, 1908, and September 29, 1908. The defence to the claim was that the leases had been duly determined by notice, and it is this question, and this alone, which arises for consideration upon the present appeal, the High Court of Judicature in Bengal having, in reversal of the judgment of the Subordinate Judge, dismissed the action.

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So far as the points to be determined are concerned, the leases may be regarded as identical, the variations in date, in the royalties payable, and the period allowed before payment begins being the only differences between the two; as will appear in the course of this judgment, these differences are immaterial to the present dispute. Both leases appear to have been in the vernacular, and the obscurity of their terms is faithfully reflected in the translation.

The lease of March 4, 1908, is the one accepted by their Lordships for the purpose of examining the clauses that bear upon the dispute. By it a grant was made by the Raja to the respondent company of coal, land, and mining rights in certain mauzas belonging to the ancestral zamindari of the Raja of Pargana Jheria for a term of 999 years. By clause 1 certain royalties were fixed for each ton of coal, and by clause 2 it was provided that the royalties mentioned should be payable quarterly, "i.e., in four kists of Baisakh, Sraban, Kartick, and Magh."

By clause 3 a certain minimum royalty was provided, which after the second year obliged the lessees to pay "an annual minimum royalty" of Rs. 13,904 until the expiration of the term, with a provision that if the royalties paid under the earlier clause were found on taking the accounts at the end of each year to be less than the minimum royalty, the lessees should be bound to make up the loss and pay the sum of Rs. 13,904 in full within the two months of the following year. The words in which this provision is couched are important, and they are as follows: "If on taking

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accounts at the end of each year it be found that the royalty paid by you for the said lands for that particular year is less than the said minimum royalty, then you shall be bound to make up the said loss and pay the said sum of Rs. 13,904 in full within the two months of the following year."

By clause 6 power was given to the lessees to take the necessary surface land for the purpose of carrying on the colliery business at a certain fixed rent per bigha, and this rent was to become due at the end of each Bengali year.

There were consequently three distinct payments to be made :
(1.) The royalties payable per ton of coal to be paid quarterly.
(2.) The annual minimum royalty to be paid within two months after the expiration of the year satisfied pro tanto by the royalties payable under (1.), the accounts being taken at the end of the year and payment made within two months of the following year.
(3.) The surface rent due at the end of each Bengali year.

By clause 9 a right was given to the lessees to surrender the term, and it is in the alleged exercise of the rights so conferred that the respondent contends that the leases have been determined. The words of the clause are therefore important, and they are as follows : "That, if you so wish, you shall be entitled to surrender all or any of the mauzas hereby leased out to you by giving me six months' written notice, which you shall be competent to give me by a registered letter and paying the minimum royalty for the said six months, i.e., a half of the annual minimum royalty. But I shall not accept any surrender for a portion of any of the mauzas, neither shall you be entitled to surrender so long as any rent or royalty remains unpaid. Instead of relinquishing all the mauzas settled, you will be able to relinquish any one or more of those mauzas by giving six months' notice in writing in the above manner. If you surrender any one or more mauzas in this way, you shall be bound to pay the whole of the minimum royalty for all the mauzas leased out as fixed in clause 3 for the remaining mauzas, i.e., you shall not be entitled to get a proportionate reduction in the minimum royalty of Rs. 13,904 fixed as above for surrendering one or more than one mauza in the above way."

The company duly entered into possession of the mining property under the said lease, carried on mining operations, and from time

to time paid the royalties and rents as agreed. But the undertaking does not appear to have prospered, and the respondents attempted to obtain a reduction of the minimum royalty payable under the lease. In this they failed, and on May 11, 1912, they sent to the Raja personally a registered letter of which the relevant parts are as follows: "By the terms of the respective leases it is open to us to relinquish the properties by giving you six months' previous notice in writing. Please take note therefore that we hereby wish to relinquish the undermentioned areas held under the leases, and that after the expiry of six months from this date, upon the payment of all royalties due to you, we shall not be responsible for any further minimum royalty rent, &c., and that all our obligations under the two leases would cease and terminate after the expiry of six months from this date." At the same time, according to the evidence of the respondents' manager, they went out of possession of the property and informed the Raja of the fact.

The Raja handed the notice to Mr. Smith, who was his general manager, and he, in accordance with what he regarded as the usual practice of the estate, requested the respondents to execute a formal deed of surrender. The lessees placed the matter in the hands of Messrs. Morgan & Co., their solicitors, and they on September 16 wrote to Mr. Smith, stating that they held the leases and asking if he wished them to prepare a deed of relinquishment, or whether he would send the form of document he required. No immediate answer was given to this letter, and on October 30, 1912, they wrote again, and to these letters on November 13 Mr. Smith sent an answer in the following terms: "I must apologize for not having replied to yours of September 3" (an obvious mistake for September 16) "and October 30 earlier. I am enclosing the copy of a relinquishment deed given us by another tenant. A deed of this sort will, I understand, be quite sufficient for our purpose. All dues on the holdings must be tendered along with the instrument for acceptance."

To this Messrs. Morgan replied on November 30, 1912, asking for a statement of what Mr. Smith said was due for the royalties. There was certainly no obligation cast on Mr. Smith to comply with this request, but it was an obvious and sensible business proposal, and indeed it seems so to have been regarded by Mr.

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Smith, who answered on December 1 saying that the matter was receiving attention, and that he would write at an early date. This promise seems to have been overlooked, for nothing transpired between the parties till April 28, when Mr. Smith wrote to the respondents saying that the minimum royalty was much in arrear, and asking that it might be liquidated at an early date. On May 3, 1913, Messrs. Morgan & Co. wrote again to Mr. Smith, recalling his promise and asking him to proceed with the matter. Mr. Smith then wrote on May 5, and explained what had happened in the following terms: "I am in receipt of yours of the 3rd. We addressed a note to Messrs. Tata & Sons on April 28 asking them to pay the minimum royalty due. I put the matter of the account before our legal adviser, and he refused to give any opinion or make up a statement of your dues, as he said you were in as good a position to do so as he was, and he failed to see why he should take the responsibility. Your obvious course was to abide by the terms of the document when relinquishing the properties, and tender the money with the relinquishment deed."

Upon receipt of that letter Messrs. Morgan immediately made out what they regarded as the account, and sent the statement on May 16, with an offer to send a cheque if the account were accepted, and to this Mr. Smith replied on May 22, stating for the first time that the Raja did not recognize the relinquishment as legal or in accordance with the agreement between the parties—first, because it did not expire with the end of the year, and, secondly, because it was not served after full payment of all dues; and he accordingly claimed the total amount of the royalties due to date. An attempt was made to settle the dispute that had thus arisen by reference to arbitration, and, this having failed, proceedings were instituted by the Raja to recover the rents on the ground that the leases were still on foot. The argument put forward in Mr. Smith's letter is the main contention advanced by the appellants both before their Lordships and in the Court below.

In order to test the value of these contentions it is necessary to examine closely the terms of the clause under which the notices were given. Dealing first with the question as to whether the notice could be given at all so as to expire at the expiration of any six months, it is important to observe that, however the clause is

construed, the actual provisions of the lease cannot without some modification be made to fit into the circumstances. The clause is open to three constructions. Either the notice must be one terminating with the end of the year ; or it may be given at the expiration of a year of the term, so as to terminate half-way through another year ; or it may be given at any time. Whichever view is adopted, the provisions as to calculation and payment of the royalties cannot be made to fit the circumstances arising with the giving of the notice. It could not have been the intention of the parties that the payment of one half of the minimum rent should be made when the notice was given, as the amount cannot be calculated till a later date, since its payment may be satisfied by current royalties.

If, therefore, the first hypothesis is adopted and the notice is given in the middle of a current year, the half cannot be ascertained until the year of the lease has expired, and it is plain that then this cannot be the only payment made. In such an event the whole annual minimum royalty would be payable and not one-half, and either two calculations must be made—the one for the half-year up to the date of the giving of the notice, and the other at its expiration—or the provision as to payment of the half is inappropriate and unnecessary. If, on the other hand, the notice is given at the beginning of the year, the royalties have to be calculated and the minimum rent fixed at a period half-way through the year, and for this, again, the lease makes no provision. There is therefore nothing in the terms of the lease itself to fix the notice as one that must be given at any definite period, and there is consequently no reason why words should be introduced into clause 9 to limit the general application of the important right to surrender which is there conferred. The notices therefore were, in their Lordships' opinion, rightly given.

There remains the consideration as to whether the conditions prescribed as those that must be observed after the notice has been served have been faithfully obeyed. On behalf of the appellant it is contended that they were not, because of the provisions in clause 9 as to payment. These occur in two passages in the clause—the first which provides that it shall be competent to give notice “by a registered letter and paying the minimum royalty for the

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said six months, i.e., half of the annual minimum royalty," and the other which stipulates that the lessees shall "not be entitled to surrender so long as any rent or royalty remains unpaid."

The first provision does not give rise to much difficulty, for, as has already been pointed out, at the time when the notice is served it is impossible to know what the annual minimum royalty may be, and in this part of the clause there is nothing to fix a time within which that payment is to be made. The words do nothing except create an obligation to pay, and it is the latter part of the clause which provides the date of payment.

The latter provision is more precise. After the notice is given, unless all the prescribed conditions are satisfied at the date when the notice expires, the lease will not be terminated, and the notice will become ineffectual. It is probable that the expression contemplated an actual surrender by handing back the leases with an indorsement, and had they been so surrendered there would, in their Lordships' opinion, have been thrown upon the lessees the difficult duty of calculating the exact amount of all the royalties that would then be due, bringing into account the royalty actually payable per ton of coal and apportioning the amount of the dead rent. But this course was not adopted. The Raja's agent, in pursuit of what he regarded as the practice of the estate and acting well within the general authority that he possessed, requested that the surrender should take place by execution of a deed. When once this course was adopted the payment of the amount was, in their Lordships' opinion, transferred to the date when the surrender was executed and delivered. It would make no difference that this date was subsequent to the date for the expiration of the notice, for its operation would take effect from the date when the notice expired whenever it was executed. Payment therefore upon this date was all that was required by the terms of the lease itself. But, apart from this, it was expressly directed by the letter of Mr. Smith of November 13. It is said that in all these acts Mr. Smith was acting in excess of his authority, but their Lordships are unable to agree with this contention.

Mr. Smith was the plaintiff's manager, and as his manager he stated in his evidence that all questions in connection with the estate came before him. In his own words, he said: "I dealt with

them, but not finally. The final decision rests with the Raja. After receiving the Raja's decisions I see them through. The Raja does not know much English. Questions of land settlement of coal property come to me for report. The terms of such property are finally settled by the Raja, I carrying out his orders." Their Lordships think it is plain from these statements that while Mr. Smith had no power finally to fix or to vary the terms upon which the Raja's land is dealt with, yet he had full authority to carry out directions when once the general question had been determined, and when the notice was handed over to him by the Raja as manager this clothed him with full authority to make such arrangements as he thought fit in the interest of the estate for carrying the notice into effect.

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Their Lordships are in agreement with the learned Subordinate Judge that the principle of estoppel does not apply to this case at all, and they think the statement of the High Court that the plaintiff was estopped by conduct is not an appropriate explanation of the true position. The word "estoppel" is not infrequently used to cover transactions to which it has no proper application. In its essence it means that the party estopped has by conduct or language prevented himself from asserting the true facts on which he would otherwise have been entitled to rely. This is not what has happened in the present dispute. There was nothing to prevent the Raja from asserting the true character of the transaction, but this, for the reason already pointed out, does not entitle him to succeed in his claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents : *Morgan, Price & Co.*

J. C.* BANWARI LAL APPELLANT ;
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 July 16. MAHESH AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Evidence—Document not in List—Use to refresh Memory—Order VII., r. 14—Joint Family Property—Alienation—Conditional Decree setting aside—Mesne Profits.

Upon an issue as to the date of a person's birth a witness, for the purpose of refreshing his memory, can refer to a horoscope made by him at the time, although the document has not been included in the list of documents under Order VII., r. 14.

When, in a suit by a Hindu to set aside a sale of joint family property made by his father, it is found that part of the purchase-money was applied to pay antecedent debts, and the sale is set aside conditionally upon the payment of the sum so applied, mesne profits are not recoverable from the alienee.

APPEAL from a judgment and decree of the Court of the Judicial Commissioner (May 12, 1915) reversing a decree of the Subordinate Judge of Gonda.

The facts appear from the judgment of their Lordships.

June 13. *De Gruyther K.C.* and *Dube* for the appellant.

The respondents did not appear.

July 16. The judgment of their Lordships was delivered by LORD PHILLIMORE. The appellant is the plaintiff in this action, which was brought by him on January 2, 1913, against the present respondents and others to recover certain shares in the village of Ferozpur which had been conveyed by his father to Kali Pershad, the ancestor of the present respondents, by three deeds of sale dated April 20, 1889, January 6, 1892, and April 13, 1894. By the first a two-anna share was conveyed for Rs. 4,000, by the second a one-anna share for Rs. 2,000, and by the third a like share for a like amount.

* *Present*: LORD ATKINSON, LORD PHILLIMORE, SIR JOHN EDGE, and MR. AMEER ALI.

The defence was that as to the first sale it could not be attacked by the plaintiff, as he, according to his own case, was not born at the time, and his father was the sole proprietor, not being joint in family, and could deal with the estate as he thought fit ; that as to all of the sales there was necessity for them, and that the money was not raised for immoral purposes. Further, there was a plea of the Indian Limitation Act.

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The point as to this plea turns upon these facts. The period for attacking such a sale in ordinary cases is fixed by art. 126 of the Indian Limitation Act at twelve years. But by s. 7, " If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed," The time prescribed is three years. The plaintiff's case is that he was born on January 4, 1892. He would come of age at eighteen, and then he would have three years, which would take him to January 4, 1913. The case for the defendants was that the plaintiff was at least twenty-eight.

The Subordinate Judge decided for the plaintiff on all points. He held that there was no necessity for any of the sales ; that the money raised by them was used for immoral purposes ; that, as regards the first sale, the plaintiff could attack it though he was not born at the time, because his father was not separate in family but joint with his own brother and apparently other relatives, and because " the alienation made by one member of the coparcenary body can be objected to by another member born subsequently." He found that the plaintiff was born on January 6, 1892, and had therefore instituted his suit in time to save it from being barred.

On appeal the judges of the Court of the Judicial Commissioner of Oudh took a different view. The judges found that the plaintiff's father was separate in family at the time when the first sale was made, which rendered it unnecessary to decide upon the proposition of law upon which the Subordinate Judge had acted. As to the second and third sales, they were of opinion that certain sums, to wit, Rs. 1,622, of the moneys received on the second sale, and Rs. 153.12 of the

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moneys received on the third sale, were applied in payment of antecedent debts, and that to this extent the sales could be supported, but to no greater extent. They found, however, that the plaintiff had not established "that he attained majority within three years before suit," and therefore they dismissed his suit. Hence this appeal.

Their Lordships will deal first with the point as to the plaintiff's age. As the appeal was heard *ex parte* the evidence on this matter was reviewed at the Bar with minuteness and care. There were three witnesses whom the Subordinate Judge saw and upon whose evidence he relied. The first was Shiva Lal. He was the family priest. He said that on the day of the plaintiff's birth he was in the village and that he made notes of the birth of the children of his disciples, and he produced a manuscript almanack with the entry of the birth of the plaintiff on January 4, 1892. Points are made against this evidence, first, that he was a resident of Bindraban and not of Ferozpur, but it is established, and indeed it is for one reason part of the defendants' case, that the plaintiff's family were by origin of Bindraban, and, secondly, that he did not produce a horoscope. It will be seen, however, that the third witness did produce one.

The second witness was Girdhari Lal; he was a first cousin, and says he was in the village at the time of the birth, and he fixes the date as being January 4, 1892, that on which his grandmother died and upon which he annually performs certain religious rites. He says that he and his mother were the only relatives in the house at the time, and that he went away next day with his mother to his grandmother's funeral.

The judges of the Court of Appeal thought that he was—in saying that he was the only male of the house present—contradicted by another witness, Baldeo, who said that he was called by the father to the house on the day after the birth, and also thought that it would be improbable that Girdhari Lal and his mother would in the circumstances go away to his grandmother's funeral; but there is no necessary inconsistency between the two witnesses, as the father may well have returned on the next day, and this may also explain why Girdhari Lal went away to the grandmother's funeral.

Baldeo, the third witness, is a Pandit. He produced an almanack and horoscope. Objection was taken to this document on the ground

that it was not entered in the list of documents as required by Order VII., r. 14, and it was rejected by the Subordinate Judge. This was an error. The document was not one to be relied upon as a probative document in itself, but it was a record made by the witness at the time, to which he was entitled to refer for the purpose of refreshing his memory. In any case, the criticism of the judges of the Court of Appeal, that there was no horoscope, was not well founded. Baldeo also deposed to January 4, 1892, as the date.

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Then there was a fourth witness, Kali Din, to whose evidence on this point no reference was made in the judgments of either Court, possibly because his principal evidence was with regard to the immoral consideration for one of the deeds of sale. But his evidence on this other point seems to have been believed, and he says that the plaintiff was born three days before the execution of the deed of sale of January 6, 1892, which would be January 3, or only one day different from that deposed to by the other witnesses.

The only evidence offered on this head by the respondents is that of the principal defendant, Mahesh. He said that the plaintiff was twenty-six or twenty-seven when the last deed, that of April 13, 1894, was executed. This was an extravagant statement. Then he reflected and said that the plaintiff was six or seven, which would make the plaintiff born somewhere about 1887 and make him twenty-four or twenty-five at the date of the institution of the suit, the case as made by the defendant's pleader being that he was at least twenty-eight.

The plaintiff also produced three doctors of repute who examined the plaintiff, one on March 9, 1913, and the other two on May 15, 1913, and thought that then he was about twenty-one. They admitted, as might be expected, that they could not speak positively to a year or so ; but as between the two cases, their evidence is of value as showing that the age attributed by the defendants to the plaintiff would not be medically probable.

Comment was made in the judgment of the Court of Appeal on the fact that the plaintiff did not produce his father or mother ; but the father, who was made a defendant in the suit, and whose acts and character were impugned, was a witness rather to be called for the defendants than for the plaintiff ; and no question seems to have been raised at the trial as to the absence of the mother. If

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any point had been made about her absence it is quite possible that an explanation might have been offered.

There remained one further matter upon which the judges of the Court of Appeal commented unfavourably. The case for the plaintiff, as stated in his plaint and made by his witnesses, was that he was born on January 4; but his statement on oath, made at the time of the settlement of the issues, was that he was born on January 6. Either date is equally good for his case. He could not himself know on which day he was born, and if he made some error or misstatement to this very trifling extent it would not destroy his case. It is possible, as it was suggested at the Bar, that he might usually reckon according to Hindu chronology, and may have made some mistake in transferring this into an English date.

Upon the whole their Lordships see no reason for differing from the finding of the Subordinate Judge in the matter, and they are of opinion that the plaintiff brought his suit in time.

As to the first sale deed, the finding in the Court of Appeal that the plaintiff's father was separate in fact at the time of its execution, and could dispose of his property as he pleased, has not been successfully impeached, and this deed must any how stand. And as to the second and third sales, their Lordships upon consideration are not disposed to disturb the findings of the Court of Appeal. The plaintiff can therefore only get these deeds set aside upon the terms of repaying the several sums which were applied to pay antecedent debts.

It will be the principal only of these sums that the plaintiff will have to pay, as the defendants have been in possession of the estate.

The Subordinate Judge made a decree in favour of the plaintiff for mesne profits, and rightly from his point of view, because the deeds were to be unconditionally set aside. But inasmuch as in the view of the Court of Appeal, which their Lordships accept, they are only to be set aside upon payment of certain sums, the defendants must be deemed to be lawfully in possession until they are set aside, and are therefore not accountable for mesne profits.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the Court of the Judicial Commissioner of Oudh should be reversed, and that the plaintiff should have a decree setting aside the second sale and giving

him possession of the one-anna share in the village, Ferozpur, which passed by that sale upon payment of Rs. 1622, and setting aside the third sale and giving him possession of the one-anna share which passed by it on payment of Rs. 153. 12, and that the plaintiff should have the costs in both Courts below and of this appeal.

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Solicitors for appellant :—*Watkins & Hunter.*

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1. BOMBAY MUNICIPALITY—Improvement Trustees—Streets—Vesting—Building Line—Compensation—Interest—City of Bombay Municipal Act (Bombay Act III. of 1888), ss. 300, 301—City of Bombay Improvement Act (Bombay Act IV. of 1898), ss. 41, 45.

When the Trustees for the Improvement of the City of Bombay, constituted by Bombay Act IV. of 1898, have given notice under s. 41 of that Act to the Municipal Commissioner that an existing street is required by them under a new street scheme construct the new street with a building line set forward from the old building line, the strip of land between the two building lines does not vest in the trustees. The vesting in the trustees under the notice is co-extensive with the revesting under s. 45, sub-s. 2.

When under s. 300, sub s. 1, of the City of Bombay Municipal Act (Bombay Act III. of 1888) premises are compulsorily ordered to be set forward to the building line, the corporation is not entitled under the Act to compensation from the owner of the premises for land which prior to the order vested in the corporation, but which will be covered by the premises as ordered to be set forward.

Unless there is something in the contract between the parties which necessarily imports otherwise, the date when one party enters into possession of the property of another is the date from which interest upon the unpaid price should run. RATANLAL CHOONILAL PANALAL v. MUNICIPAL COMMISSIONER FOR BOMBAY. 233

2.—Public Streets—Powers—Acquisition of adjoining Land—Compensation—Preservation of Regular Line—Collateral Object—City of Bombay Municipal Act (III. of 1888, *Fom.*), ss. 296, 297, 301.

By s. 297 of the City of Bombay Municipal Act the Municipal Commissioner may prescribe

BOMBAY MUNICIPALITY—*continued*.

a regular line on each side of a public street, and if the line is so prescribed that any land not vesting in the corporation falls within it, the Commissioner may, by s. 299, take possession of it on behalf of the corporation, the former owner receiving compensation under s. 301. Sects. 297 to 301 are headed in the Act "Preservation of regular line in public streets." By s. 296 the Commissioner has power to acquire any land required for widening, extending, or otherwise improving any public street, subject to the payment of compensation under the Land Acquisition Act (I. of 1894).

In 1909 the Commissioner prescribed a line on one side of a public street so that land belonging to the appellants fell within it, and, having served them with notice, took possession. The Commissioner wished to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level crossings. The appellants contended that the procedure under ss. 297, 299, and 301 was inapplicable and the proceedings ultra vires, and that the land could only be acquired subject to payment of compensation under the Land Acquisition Act, 1894 :—

Held, that the powers given by ss. 297 and 299 of the Act could be exercised although the motive of the Commissioner, who acted in good faith and in the discharge of his duties, was not to preserve the regular line of the street, and that consequently the compensation payable to the appellants was to be calculated according to s. 301 of the Act, and not under the Land Acquisition Act, 1894. **NARMA v. MUNICIPAL COMMISSIONER FOR BOMBAY** 125

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CENTRAL PROVINCES TENANCY ACT (XI. of 1898), s. 45, sub-ss. 1, 6—*Sir Land—Mortgage before Act—Conciliation Award after Act—Mortgagor's Occupancy Right*.

The Central Provinces Tenancy Act (XI. of 1898), as amended by Act XXI. of 1899, provides : "Sect. 45. (1.) Notwithstanding any agreement to the contrary a proprietor who, after the commencement of this Act, temporarily or permanently loses (whether under decree or order of a civil Court or a Revenue officer or otherwise) or transfers his rights to occupy sir land as a proprietor, shall at the date of such loss or transfer become an occupancy tenant of that sir land. . . . (6.) Nothing in this section shall affect a document duly registered before the commencement of this Act; and, on any surrender or transfer such as is described in sub-section (1.) being made, decreed or ordered in pursuance of such a document, the rights of the parties to occupy the sir land shall accrue as if this Act had not been passed. Explanation :—For the purposes of this section a transfer includes a mortgage and a lease."

In July, 1901, a foreclosure decree absolute was made under two registered mortgages, made in 1881 and 1884, of fifteen villages including sir lands. Upon appeal the decree was set aside on terms and the matter referred by agreement to a Conciliation Board, which awarded that certain payments should be made by the mortgagors, and that in default seven of the village should be foreclosed. The mortgagors having made default, a foreclosure decree absolute was made in 1910 in respect of the seven villages. The mortgagees claimed that under the decree they were entitled to actual possession of the sir lands :—

Held, that the conciliation award of 1905 was, for the purposes of the case, a fresh origin of rights between the parties, that s. 45, sub-s. 6, consequently did not apply, and that under s. 45, sub-s. 1, the mortgagors had occupancy rights in the sir lands of the seven villages. **NARAYAN GANESH GHATATE v. BALIRAM** 179

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CHOTA NAGPUR ENCUMBERED ESTATES ACT—*Land outside Chota Nagpur—Mortgage—Power of Manager—Money paid under Pressure of Legal Proceedings—Voluntary—Payment—Bengal Regulation VIII. of 1819*.

The Chota Nagpur Encumbered Estates Act (VI. of 1876) does not apply to immovable property outside Chota Nagpur; a manager appointed under that Act has no power to reduce the rate of interest provided by a mortgage of land not situated within Chota Nagpur.

See Bhicha Ram Sahu v. Bishambhar Nath Sahi (1912) 16 Cal. L. J. 527 approved.

Having regard to the nature of the procedure provided by s. 14 of the Patni Regulation (Bengal Regulation VIII. of 1819), a payment of rent by a patnidar to his zamindar upon receipt of notice under that section that the tenure would be sold to realize the rent due

CHOTA NAGPUR ENCUMBERED ESTATES ACT—*continued*.

does not fall within the rule that money paid under pressure of legal proceedings is irrecoverable. **RAJA OF PACHETE v. KUMUD NATH CHATTERJI** - - - - - 103

COMPROMISE—Reversioner.

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CONTRACT—*Wager—Sale—Unilateral Intention to wager—Pakka Adatias—Bombay Act III. of 1865, ss. 1, 2—Indian Contract Act (IX. of 1872), s. 30.*

Speculation does not necessarily involve a contract of wagering, and to constitute a wagering contract an intention to wager by both parties is essential.

The respondent instructed the appellants, who acted as pakka adatias, to sell for him 4000 tons of linseed for future delivery. According to the customary incidents of the employment of pakka adatias the transaction between the parties took the form of a sale from the respondent to the appellants. The appellants made contracts in their own names selling the linseed to various buyers at the agreed price. The appellants consequently did not stand to gain or lose by any change in the market price. There was no agreement or understanding, express or implied, between the appellants and the respondent that the linseed should not be delivered, nor that the appellants should protect the respondent from liability to make delivery. The market price having risen before the date of delivery, and the respondent not having made any delivery, the appellants sued him to recover the loss incurred by them upon the contracts of resale, less an amount deposited by the respondent as security against loss:—

Held, that the transaction was not a wagering contract, even if the appellants did not expect the respondent to deliver, and that the appellants were entitled to recover. **BHAGWANDAS PARASRAM v. BURJORJI RUTTONJI BOMANJI** - - - 29

CUSTOM OF FAMILY—*Inheritance—Mahomedan Law—Evidence of Custom—Instances—Bombay Regulation IV. of 1827, s. 26.*

In a suit as to the right of inheritance upon the death intestate of a member of a Mahomedan family for many generations resident in Sind, the appellant alleged that by a custom of the family, varying the Mahomedan law, the sister of the intestate was excluded in favour of the male paternal collaterals. By s. 26 of Bombay Regulation IV. of 1827, extended to Sind by notification, the law to be observed upon the trial of suits, in the absence of Acts or Regulations applicable to the case, is "the usage of the country in which the suit arose." The appellant adduced evidence in support of the alleged family custom, and further contended that under s. 26 above mentioned a presumption arose in favour of the custom as being one known to prevail in the district:—

Held, that the presumption relied upon did not arise, and that the evidence did not establish that the custom existed in the family.

Consideration of the weight to be attached to evidence of instances of inheritance in a

CUSTOM OF FAMILY—*continued*.

family in accordance with, or contrary to, an alleged custom of the family.

Observations on this point in *Mirabivi v. Vellayanna*, (1883) I. L. R. 8 M. 464 approved. **ABDUL HUSSEIN KHAN v. BIBI SONA DERO**-10

DECLARATORY DECREE—*Alienation by Hindu Widow—Suit by Reversioners—Specific Relief Act (I. of 1877), s. 42.*

The widow and daughter of a deceased Hindu governed by the Mitakshara executed a deed of gift of his property in favour of one of the next reversionary heirs to the deceased. Three brothers who claimed to be reversionary heirs equally with the grantee sued for a declaration that the deed was invalid and not operative as against them after the deaths of the grantors. The grantee pleaded that he was the only next reversionary heir and that, upon the principle of acceleration, he was absolutely entitled to the property by virtue of the deed. Both Courts in India found that the plaintiffs were also next reversioners. The High Court made a declaration in favour of the plaintiffs as prayed:—

Held, that the declaration was rightly made under s. 42 of the Specific Relief Act (I. of 1877) although it necessarily involved a finding that the plaintiffs were next reversionary heirs.

Janaki Ammal v. Narayanasami Aiyer (1916) L. R. 43 I. A. 207 distinguished. **SAUDAGAR SINGH v. PARDIP SINGH** - - - 21

ESTOPPEL—*Representation—Change of Position—Gift of Immovable Property—Mutation of Names—Support of Grantor—Indian Evidence Act (I. of 1872), s. 115.*

Upon the sale of a village by the manager of an encumbered estate it was purchased benami on behalf of the zamindar of the estate, but no transfer to the benamidar was made. After the discontinuance of the management the benamidar, upon the instructions of the zamindar, purported to transfer the village by a deed of sale to the zamindar's illegitimate daughter, who, however, paid no consideration. The zamindar by petition supported an application by the grantee for mutation of names, and she became the registered proprietrix:—

Held, that the zamindar and those claiming under him were estopped from denying the title of the grantee, since as a result of the zamindar's acts her position had been changed in that she had become liable for the revenue assessed upon the village. **RAJA OF DEO v. ABDULLAH** - - - - - 97

EVIDENCE—*Document not in List—Use to refresh Memory—Order VII., r. 14—Joint Family Property—Alienation—Conditional Decree setting aside—Mesne Profits.*

Upon an issue as to the date of a person's birth a witness, for the purpose of refreshing his memory, can refer to a horoscope made by him at the time, although the document has not been included in the list of documents under Order VII., r. 14.

When in a suit by a Hindu to set aside a sale of joint family property made by his father

EVIDENCE—continued.

it is found that part of the purchase-money was applied to pay antecedent debts, and the sale is set aside conditionally upon the payment of the sum so applied, mesne profits are not recoverable from the alienee. *BANWARI LAL v. MAHESH* 284

—Charitable endowment—Intention of donor—Confirmatory inam grants. See *HINDU LAW*, 5.

—Documents—Order XIII., r. 1. See *MAHOMEDAN LAW*.

—Family custom—Instances. See *CUSTOM OF FAMILY*.

EXECUTION—Transfer to Collector—Mortgage by Judgment Debtor—Invalidity—Code of Civil Procedure (Act XIV. of 1882), s. 325-A.

When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under s. 320 of the Code of Civil Procedure, 1882, the effect of s. 325-A is that a mortgage of the property, or any part of it, made by the judgment debtor while the Collector can exercise the powers given to him by ss. 322 to 325 is absolutely void, and not merely void as against the Collector and those claiming under him.

Magniram Vithuram v. Bakubai (1912) I. L. R. 36 B. 510 disapproved.

Salu Bai v. Bujat Khan (1917) 13 Nagpur L. R. 130 approved. *GAURISHANKAR BALMUKUND v. CHINNUMAYA* 219

GHATWALI TENURE—Succession—Incidents of Tenure—Rights of Family.

Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the zamindar approves as competent to perform the duties. It is the right of the family, unless there is no male member competent, to have one or more of the members appointed. The member appointed, however, does not hold on behalf of the family, and the other members have no rights in the land while it is in his hands as ghatwal. *DURGA PRASHAD SINGH v. TRIBENI SINGH* 251

1. HINDU LAW—Adoption—Dravada Country—Widow's Power—Absence of Husband's Authority—Assent of Sapindas.

According to the Mitakshara law as applied in the Madras Presidency, a Hindu widow may, without her husband's authority, adopt a son to him with the assent of his sapindas; if the assent of the nearest sapinda is not given, the assent of remoter sapindas is not sufficient to make an adoption valid. *VEERA BASAVARAJU v. BALASURYA PRASADA RAO* 265

2.—Adoption—Power to make second Adoption—Limit of Power—Widow of first adopted Son.

An authority to adopt given by a Hindu governed by the Mitakshara to his widow cannot be exercised to make a second adoption when the son first adopted has died after attaining full legal capacity to continue the line, either

HINDU LAW—continued.

by the birth of a natural-born son or by the adoption to him of a son by his own widow.

The above rule held to apply where it was not proved that the widow of the first adopted son had no authority to adopt, without deciding that that circumstance was essential to its application.

Ramakrishna v. Shamarao (1902) I. L. R. 26 B. 526 (F.B.) approved. *MADANA MOHANA DEO v. PURUSHOTHAMA DEO* 156

3.—Impartible Estate—Right to Maintenance—Co-parcenary—Custom—Property in Hands of Devisee.

An impartible zamindari is the creature of custom; it is of its essence that no co-parcenary in it exists. Apart, therefore, from custom and relationship to the holder the junior members of the family have no right to maintenance out of it.

A custom entitling the sons of the holder to maintenance has so often been judicially recognized that it is not necessary to prove it in each case.

Observations in *Sartaj Kuari v. Deoraj Kuari* (1887) L. R. 15 I. A. 51, and later cases, explained.

There is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right.

Nilmony Singh Deo v. Hingoo Lall Singh Deo (1879) I. L. R. 5 C. 259 approved. *RAMA RAO v. RAJA OF PITTAPUR* 148

4.—Joint Family—Education at Family Expense—Acquired Property—Mitakshara.

A member of a Hindu joint family governed by the Mitakshara received at the expense of the family an ordinary education suitable to his position as a member of the family. He subsequently became a clerk to a pleader and afterwards a broker; he also carried on a money-lending business. From those occupations, without the employment of the joint family funds, he acquired gains:—

Held, that the gains were not partible as joint family property.

Review of the authorities. *METHARAM RAMRAKHIOMAL v. REWACHAND RAMRAKHIOMAL* 41

5.—Partition—Charitable Endowment—Food Chattiram—Scheme of Management—Intention of Donor—Confirmatory Inam Grants—Evidence.

The first appellant, the manager of a joint Hindu family the property of which was the subject of a partition suit, was in possession of lands granted about 1739 to an ancestor of the family, who was head of a mutt or institution founded by the donor. Some of the lands were granted for the ancestor's personal enjoyment, others for charitable purposes, namely, for conducting a food chattiram and building an agraharam. The intention of the donor as to the succession to the latter lands was not clearly indicated by the grants, but having regard to the form of confirmatory inam grants made in

HINDU LAW—continued.

1865 the intention was found to be that they should be held by the successive heads of the mutt. The first appellant was the present head. The High Court by its decree for partition ordered that a scheme should be settled for the management of the properties devoted to charitable purposes:—

Held, that there was no jurisdiction to order a scheme, since it would deprive the first appellant of his exclusive right to the management.

Quære whether the law as accepted by the Board in *Ramanathan Chetty v. Murugappa Chetty* (1906) L. R. 33 I. A. 139 applies to a charity of the kind above mentioned. *SETHURAMASWAMIAR v. MERUSWAMIAR* - 1

6. — *Reversioner—Claim to succeed—Antecedent Family Dispute—Compromise—Taking Benefit of Compromise—Reversionary Claim barred.*

Upon the death of a Hindu governed by the Mitakshara his nephew (the appellant) and other members of the family disputed the widow's right to succeed to the property left by the deceased. The appellant was a party to a compromise made in 1892 by which the property was immediately divided. He did not take a share under the compromise, but he was thereby recognized as the adopted son of another deceased uncle, and in 1898 obtained by relinquishment possession of the share of the property allotted to that uncle's widow. In 1912 the widow of the original holder died, and the appellant and his brother claimed the entire property as reversioners:—

Held, that the appellant having entered into and taken the benefit of the compromise was precluded from claiming as reversioner. *KANHAI LAL v. BRIJ LAL* - 118

7. — *Succession—Oudh Taluqa—Primogeniture Sanad—"Accretions"—Property purchased by Taluqdar—Intention to vary Descent—Villages substituted by Government—House allotted for Use of Taluqdar.*

The Crown has power in British India by a grant of lands to limit their descent in any way it pleases, but a subject has no power to impose upon lands, or other property, any limitation of descent at variance with the ordinary law applicable.

In 1861 the Crown granted a taluqa to a Hindu, subject to a primogeniture sanad. Upon an appeal to the Privy Council in a suit as to the succession to the property of a deceased holder of the taluqa, it was declared in 1905 that the "taluqa as constituted at the date of the sanad, with accretions (if any) or properties (if any) appurtenant to the taluqa," passed to the appellant, but that the residue of the property passed to the respondent, and the case was remitted for determination under that declaration. No family custom of primogeniture was alleged. Upon appeal from final decrees of the High Court:—

Held, that under the declaration villages substituted by the Government after 1861 for villages held under the sanad, and a house

HINDU LAW—continued.

granted by the Government after 1861 to the taluqdar for his use as taluqdar, passed to the appellant, but that villages purchased after 1861 by the deceased taluqdar passed to the respondent, whether or not the purchaser intended to incorporate them with the taluqa. *KAJINDRA BAHADUR SINGH v. RANI RAGHUBANS KUNWAR* - 134

8. — *Widow's Estate—Reversioner's Interest—Holder relinquishing Estate—Invalidity against Minor.*

The next reversioner to an estate held under the Hindu law by a female for her life has no interest in praesenti in the property; until it vests in him he has no interest which he can assign or relinquish, or even transmit to his heirs. The guardian of a minor reversioner consequently cannot bind him by purporting on his behalf to enter into a compromise by which the female holder relinquishes the estate to other relatives; nor is he bound by an award or decree made in pursuance of the compromise.

AMRIT NARAYAN SINGH v. GAYA SINGH - 35

9. — *Widow's Estate—Reversioner—Decree by Estoppel against Widow—Trial on Merits in Privy Council—Reversioner bound—Res judicata.*

When the estate of a deceased Hindu has vested in a female heir for her life, a decree fairly and properly obtained against her, after a trial upon the merits, is binding upon the reversionary heirs, although the female heir was personally estopped from denying the material facts.

A Hindu female, in whom an estate vested upon the death of her husband and infant son, instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid. Both Courts in India held that she was estopped by her conduct from denying the validity of the adoption, and the suit was dismissed on that ground. Upon appeal to the Privy Council the decree was affirmed upon the ground of estoppel, and the Board further held upon the facts that the adoption was valid. Upon the death of the widow the first appellant sued as reversionary heir, alleging that the adoption was invalid. It appearing that upon the previous appeal to the Board there had been a fair trial of the right upon the merits:—

Held, that the reversionary heir was bound by the decision as res judicata. *CHAUDHRI RISAL SINGH v. BALWANT SINGH* - 168

— *Widow—Alienation—Reversioner.*
See DECLARATORY DECREE.

IMPARTIBLE ESTATE: *See HINDU LAW, 3.*

INAM—Lost Grant by Native Ruler—Ownership of soil—Kudivaram—Presumption—Madras Regulation XXXI. of 1802—"Estate"—Madras Estates Land Act (I. of 1908, Mad.), s. 3, sub-s. 2 (d).

In the absence of evidence as to the terms of an inam grant made by a native ruler before British rule, there is no presumption of law

INAM—continued.

that the grant was only of the royal revenue from the land, and not of the soil.

Having regard to the terms of Madras Regulation XXXI of 1802, the entry of an aghaharam village in an inam register as having been granted by a Reddi king in 1373, and enjoyed by the grantee's successors for 429 years, shows conclusively that the soil of the village was granted, there being, in the present case, dumbalas, also evidence as to the way in which the inamdars had treated the lands, which supported that view, and no evidence that at the date of the grant there were tenants having occupancy rights.

The village so entered consequently is not one "of which the land revenue alone has been granted," so as to be an "estate" within s. 3, sub-s. 2 (d), of the Madras Estates Land Act, 1908; and the inamdars therefore can maintain suits in the civil Court to eject tenants under leases made prior to 1908 for terms which have expired. *SURYANARAYANA v. PATANNA*

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JOINT FAMILY : See HINDU LAW, 4.

LAND TENURE—Sarbarakars in Khurdah—Absence of heritable or transferable Rights—Liability to Dismissal for Misconduct.

Sarbarakars in Khurdah have no heritable or transferable right in their office or in the sarbarakari jagir lands. They are liable to dismissal for misconduct, and upon dismissal lose all rights in the jagir lands.

Saddanando Maiti v. Noverattam Maiti (1871) 8 Beng. L. R. 280, discussed. *PARAMANANDRA DAS GOSWAMI v. KRIPASINDHU ROY* - 246

1. LAND TENURE IN BENGAL—Char acquired in 1833—Purpose of letting—Tenure—holder—No accrued Right as Raiyat—Bengal Tenancy Act (VIII. of 1885), ss. 5, 19.

The appellants' predecessor in 1833 acquired from the Government extensive char lands in Bengal for the purpose of reclaiming them and then letting them at a profit to cultivators. There was some evidence that on occasions prior to 1885 the Board of Revenue and its subordinates had regarded the holding as raiyati :—

Held, that the appellants were tenure holders within s. 5 of the Bengal Tenancy Act, 1885; and that s. 19, which saves occupancy rights accrued to raiyats prior to the Act, did not apply, as neither the appellants nor their predecessor had held a raiyati interest in the land. *RAJANI KANTA GHOSE v. SECRETARY OF STATE FOR INDIA* - 190

2.—Tenure-holder or Raiyat—Area exceeding a Hundred Bighas—Presumption—Cultivation by Underlessee—Bengal Tenancy Act (VIII. of 1885), s. 5, sub-ss. 1, 4, 5.

A reclamation lease of over 250 standard bighas of land, to which the Bengal Tenancy Act, 1885, applied, gave to the tenant an unfettered option as to the means by which the land should be brought under cultivation. He underleased it to a neighbouring landowner,

LAND TENURE IN BENGAL—continued.

leaving it to the underlessee's discretion what agency should be employed for that purpose :—

Held, that the presumption, arising under s. 5, sub-s. 5, of the Act, that the tenant was a tenure holder and not a raiyat, since the area exceeded 100 standard bighas, was not rebutted under the circumstances of the case by having regard, as directed by sub-s. 4 (b), to the purpose for which the tenancy right was originally acquired. *DEBENDRA NATH DAS v. BIBUDHENDRA BHRAMABAR ROY* - 67

1. LANDLORD AND TENANT—Mining Lease—Construction—Right to Surrender—Condition as to Payment of Money due—Time for Payment—Waiver.

The appellant by lease for 999 years granted to the respondents coal mining rights in certain villages. Royalties per ton of coal were to be paid quarterly, and if at the end of each Bengali year the amount so paid had not reached a fixed minimum the difference was to be paid within the two following months; rent for surface rights was to be paid annually. Clause 9 provided that the respondents should be entitled to surrender any of the villages upon giving six months' written notice "and paying the minimum royalty for the said six months," and that the respondents should "not be entitled to surrender so long as any rent or royalty remains unpaid."

On May 11, 1912, the respondents gave six months' notice of their intention to surrender all the villages. The appellant's manager requested that a formal deed of surrender should be executed. On May 22, 1913, the deed not having been yet tendered or the amount due ascertained, the appellant denied that the surrender was effectual on the grounds that the notice did not expire at the end of the Bengali year, and that the amount due had not been tendered; the appellant subsequently sued for royalties upon the basis that the lease was subsisting :—

Held—(1.) that the right to give notice under clause 9 could be exercised at any time; (2.) that that clause did not require that the amount due should be tendered when the notice was given, and that, the appellant's manager having requested that the surrender should be by deed, the payment had not to be made until the deed was tendered; and (3.) that the lease had been terminated and the suit therefore failed. *DURGA PRASHAD SINGH v. TATA IRON AND STEEL CO.*

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2.—Notice to Quit—Test of Sufficiency—Service by registered Post—Transfer of Property Act (IV. of 1882), s. 106

A notice to quit though not strictly accurate or consistent in its statements, may be effective, and should be construed ut res magis valeat quam pereat. The test is, what would the notice mean to the tenant who is presumably conversant with the terms and circumstances of the tenancy.

A notice proved to have been properly directed and posted (especially if registered) is to be presumed to have reached the person to

LANDLORD AND TENANT—continued.

whom it is directed in the ordinary course of postal business, unless the contrary is proved. The fact that the receipt for a registered letter is signed on behalf of the addressee by a person who is not proved to have had authority from him to receive it is no evidence that the letter did not reach the addressee.

The appellants held certain lands consisting of 2 bighas $2\frac{1}{2}$ cottahs, formerly in the possession of one N. R., paying an annual rent of Rs. 25 to the respondents. The respondents sent by registered post to each of the appellants a notice to quit, purporting to refer to lands standing in the name of N. R. of which the appellants were in possession paying Rs. 25 yearly rent, but stating that the lands were 6 cottahs in extent. The receipts for the registered letters were in some cases signed by the addressee and in some purported to be signed on his behalf. The appellants did not give evidence denying the receipt of the notices:—

Held, that the notices were effective notices to quit the entire holding, and that the service was in compliance with s. 106 of the Transfer of Property Act, 1882. **HARIHAR BANERJI v. RAMSASHI ROY** 222

LIMITATION—Chaukidari Chakaran Lands—Transfer to Zamindar—Suit by Patnidar—Village Chaukidari Act (VI. of 1870, Bengal)—Indian Limitation Act (XV. of 1877), Sched. II., arts. 113, 144.

The respondent was patnidar or darpatnidar of villages under patnis granted by the appellant. Chaukidari chakaran lands situated within the villages having been transferred by Government to the appellant, the respondent sued for declarations that the lands formed part of the several patnis, for settlements of the lands, and possession:—

Held, that the suits were not suits for specific performance of contracts within art. 113 of Sched. II. of the Indian Limitation Act, 1877, but suits for possession of immovable property within art. 144; and that the period of limitation accordingly was not three but twelve years. **RANJIT SINGH v. MAHARAJ BAHADUR SINGH** 162

MADRAS ESTATES LAND ACT, 1908, s. 3. sub-s. 2 (d).
See INAM.

MADRAS RENT RECOVERY ACT (Mad. ACT VIII. of 1865), s. 11—Payment of enhanced Rent—Implied Contract—Absence of Consideration.

The Madras Rent Recovery Act, 1865, s. 11, among rules to be observed in the decision of suits regarding rates of rent, provides "all contracts for rent, express or implied, shall be observed."

A tenant of dry lands sank a well at his own cost and thereafter cultivated the land with garden crops. Prior to the sinking of the well the tenant had always paid a uniform rent on a dry basis; subsequently the landlord claimed, and the tenant for some years paid, an enhanced rent, namely, at the garden crop rate. In a

MADRAS RENT RECOVERY ACT—continued.

suit by the tenant to obtain pattas at the usual dry rate:—

Held, that there was an implied contract to pay rent at the dry rate and that there was no consideration to support an implied contract to pay at the enhanced rate; further, that to construe the original contract as a contract to pay at the dry rate only so long as the land remained dry, leaving the subsequent rent to depend upon the produce, would be repugnant to the Act. **JAGAVEERA RAMA ETTAPPA v. ARUMUGAM CHETTI** 195

MAHOMEDAN LAW—Minors—Guardianship—Alienation by Mother—Invalidity—Marriage—Legitimacy—Acknowledgments—Admission of Documents—Code of Civil Procedure (V. of 1908), Order XIII., r. 1.

Under Mahomedan law a mother has no power as de facto guardian of her infant children to alienate or charge their immovable property.

During a father's life he is the legal guardian of his minor children, though the mother has rights as to their custody; after his death, his executor (in Sunni law) is their legal guardian, or, if there is no executor, their grandfather, or if he be dead, his executor. In the absence of any legal guardian the duty of appointing one devolves upon the judge as representing the Sovereign. If the mother is the father's executor, or has been appointed, she has the powers of a legal guardian, but those powers are subject to strict conditions as to immovables. If there is no legal guardian, the person in charge of a minor (such as the mother) has power as de facto guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities (such as food, clothing, or nursing), but has no power to deal with the immovable property.

Ayderman Kutti v. Syed Ali (1912) I. L. R. 37 M. 514 disapproved.

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother.

Rule as laid down in **Mahatala Bibee v. Prince Ahmed Haleem ooz-Zaman** (1881) 10 Cal. L. R. 293 applied.

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order XIII., r. 1, may be admitted at a later stage at the discretion of the Court. **IMAMBANDI v. MUTSADDI** 73

MAINTENANCE—Impartible estate.
see HINDU LAW 3.

1. MORTGAGE—Attestation—Pardanishin Executant—Transfer of Property Act (IV. of 1882), s. 59.

A mortgage deed for over Rs. 100 purported to be signed by a pardanishin lady on behalf of her son, a minor, and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it; but her son came from

MORTGAGE—continued.

behind the parda and told them that it had been signed by his mother; they thereupon added their signatures as witnesses:—

Held, that the deed was not "attested" within the meaning of s. 59 of the Transfer of Property Act, 1882, and was consequently invalid.

Shamu Patter v. Abdul Kadir Rawathan (1912 L. R. 39 I. A. 218 applied).

Padarath Ram Nair Upadhia (1915) L. R. 42 I. A. 163 distinguished. *GANGA PERSHAD SINGH v. ISHRI PERSHAD SINGH* - 94

2.—*Decree—Failure to comply with Statute—Sale—Confirmation—Suit to redeem—Transfer of Property Act (IV of 1882), ss. 86, 88, 89—Code of Civil Procedure (XIV of 1882), s. 244.*

In November, 1886, the mortgagee of ancestral property of a Hindu obtained against the mortgagor and his two sons, who were minors duly represented by their guardian, a decree for the amount due "to be recovered from the first defendant personally and by sale of the mortgaged property." The decree did not comply with the Transfer of Property Act, 1882, ss. 80, 88, and 89. The property had been attached in August, 1886, under a similar decree which was set aside as against the sons and was superseded by the decree of November. Under a sale proclamation issued in January the right, title, and interest of the defendants was sold; the mortgagee, who was allowed by the Court to bid, became the purchaser. The sale was confirmed and a certificate issued. In November, 1907, the appellant, the survivor of the two sons, sued to redeem:—

Held, that the suit could not be maintained, (1.) because the right, title, and interest of the appellant had been sold in execution of a decree of the Court which had jurisdiction in the matter, and (2) because under the Code of Civil Procedure, 1882, s. 244, the validity of the sale could not be questioned in a fresh suit but only by application before confirmation to the Court executing the decree. *GANAPATHY MUDALIAR v. KRISHNAMACHARIAR*. - 54

3.—*Decree or Sale—Extinguishment of Security—Unenforceable Decree—Second Mortgage—Transfer of Property Act (IV. of 1884), ss. 85, 89.*

A decree made under s. 89 of the Transfer of Property Act, 1884, for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished.

Where, therefore, the owner of property subject to two mortgages has succeeded as heir to the first mortgagee, who had obtained but not executed a decree under s. 89, if that decree is inoperative against the second mortgagee, either because the second mortgagee was not made a defendant under s. 85, or because its enforcement has become barred by limitation, the second mortgagee is entitled to a decree for sale of the mortgaged property free from any charge in favour of the owner. *HET RAM v. SHADI LAL* - 150

MORTGAGE—continued.

—Judgment debtor — Execution transferred to Collector.

See EXECUTION.

—Sir lands.

See CENTRAL PROVINCES TENANCY ACT.

ODDH RENT ACT (XXII. of 1886), Ch. VII.**A—Thikdar—Enhancement of Rent.**

A favourable rent payable by a thikadar, or person to whom the collection of rent has been leased, is liable to be enhanced under Ch. VII-A added to the Oudh Rent Act (XXII. of 1886) by U. P. Act IV. of 1901, in the circumstances and subject to the conditions therein provided. *PARBATI KUNWAR v. DEPUTY-COMMISSIONER OF KHERI* - 111

ODDH TALUQ—Succession—Intention to vary descent.

See HINDU LAW, 7.

PAKKA ADATIA: See CONTRACT.**PARTITION—Charitable endowment.**

See HINDU LAW, 5.

PARTNERSHIP—Agreement—Agreed Duration of Partnership—Business at a Loss—Decree for Dissolution—Discretionary Power of the Court—Indian Contract Act (IX. of 1872), s. 252, s. 254, sub-s. 6.

By the Indian Contract Act, 1872, s. 252.

"Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them....." By s. 254, "At the suit of a partner the Court may dissolve the partnership in the following cases:—..... (6) when the business of the partnership can only be carried on at a loss."

A partnership agreement for the supply of stone for the construction of a dock provided that the partnership should continue until the completion of the supply for the works. Before that event one of the partners sued for a dissolution and established that the business could only be carried on at a loss:—

Held, that the trial judge had a discretionary power to decree a dissolution, and that, he having ordered a dissolution neither capriciously nor without disregard of any legal principle, the exercise of the discretion was not open to review upon appeal. *REHMAT-UN-NISSA BEGAM v. PRICE* - 61

1. PROCEDURE—Appeal to High Court—Jurisdiction—Record of Rights—Standard of Measurement—Code of Civil Procedure (XIV of 1882), s. 584—Bengal Tenancy Act (VIII. of 1885), s. 109-A, sub-s. 3.

The right of appeal to the High Court given by s. 109-A, sub-s. 3, of the Bengal Tenancy Act, 1885, is subject to s. 584 of the Code of Civil Procedure, 1882, and can only be exercised upon the grounds therein mentioned. The High Court has, therefore, no jurisdiction under the sub-section to set aside the decree of a District Judge upon the ground that he had

PROCEDURE—*continued*.

applied the wrong standard of measurement to land of which the rent was in question. **NAFAR CHANDRA PAL v. SHUKUR** - - - 183

2. — *Appeal to High Court—Time-barred Appeal—Ex parte Order of single Judge admitting Appeal—Reconsideration upon Hearing of Appeal—Indian Limitation Act (IX. of 1908), s. 5.*

At the hearing by a Division Bench of the Madras High Court of an appeal presented after the period allowed by the Indian Limitation Act, 1908, but which has been admitted under s. 5 of that Act by an order made *ex parte* by a single judge, there is jurisdiction to dismiss the appeal upon the ground that sufficient cause for the delay has not been shown.

The above procedure is in accordance with the practice of the Madras and other High Courts, but it is urgently expedient that a procedure should be adopted which will secure that any question of limitation affecting the competence of the appeal should be determined finally at the stage of its admittance. **KRISHNASAMI PANDIKONDAR v. RAMASAMI CHETTIAR** 25

REGULATION.

—Bengal Regulation VIII. of 1819, s. 14 103

—Bombay Regulation IV. of 1827, s. 26 10

—Madras Regulation XXXI. of 1802, s. 15 209

REVERSIONER—Compromise.

See HINDU LAW, 6.

—Decree by estoppel against widow.

See HINDU LAW, 9.

REVENUE SALE — *Notification*—"Official Gazette"—*Calcutta Gazette—Government Vernacular Gazette—Bengal Land Revenue Sales Act (XI. of 1859), ss. 6, 33.*

The "official Gazette" in which by s. 6 of Act XI. of 1859 a notification is to be published of the revenue sales therein referred to is the *Calcutta Gazette*. A sale is not "contrary to the provisions of this Act" within s. 33 by reason of no notification having been published in a Government vernacular Gazette circulating in the locality. **SHARFUDDIN HOSSAIN v. RADHA CHARAN DAS** - - - 205

SARBARAKARS: *See LAND TENURE.*

WAGER: *See CONTRACT.*

WILL—*Construction—Life Interests—Reversionary Trust—"If then living"—Vested Estate.*

A Parsi by his will devised a house to his wife for her life and directed that after her decease his executors should hold the house in trust for his son J. for life, and in the event of J.'s death in trust for J.'s widow (as to part if he so appointed) and for J.'s issue, and in default of such issue and subject to such appointment, in trust for the testator's son K. "if then living." J. died unmarried in the lifetime of the testator's widow, and of K.:—

Held, that upon the death of J. the house vested absolutely in K. subject to the life interest of the testator's widow. **CAPADIA v. CAPADIA** - - - 257

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This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf from an old book. The paper has a slightly textured appearance with some minor discoloration and a small dark stain near the bottom center. The left edge of the page is bound, showing the stitching and the adjacent page. The overall tone is warm and vintage.

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